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Labeling and Deviance

► Cultural Criminology

Labeling Theory

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Overview

Deviance is a label attached to certain acts and individuals; those acts need not be harmful to be designated as bad, and those individuals may not have even committed the acts in question, but it is the label – the designation, the *judgment* – that renders the acts and the individuals as deviant. Other acts may be more harmful but considered less heinous; other individuals may be more dastardly without attracting an equal measure of stigma. Labeling theory argues that, from a sociological perspective, what *counts* is this designation. Other theories of deviance attempt to explain the incidence or prevalence of concretely real acts with concretely real consequences – robbery, adultery, murder, drug use, rape, and the like. Labeling theorists do not say that such designated behavior is not real, or that its consequences are not real, until they are labeled; they say that the behavior is not specifically *deviant* until the label (self-labeling included) is applied. One man may kill another, but it is not *murder* – a deviant category of killing – until audiences (a judge, a jury, a community, oneself) label the act *as* murder. It is still a killing: Someone has died, and forensics may be able to determine whether the first man caused the second's death. What is deviant is determined socially and culturally. Labeling theory is a constructionist perspective *par excellence*.

Deviance may be viewed *horizontally* or *vertically*. At the micro level, deviance is manifested by how one or more persons or members of one small collectivity react to another; labeling entails judgments made by individuals or social circles. When Person A evaluates and reacts to Person B's behavior, Person A acts as an "audience." Multiplied dozens of times, this represents the labeling process at the horizontal level. In contrast, *vertically*, labeling can be viewed at the cultural, institutional, and social-structural level. When labeling is institutionalized, it is coagulated into preexisting potential judgments, analogous to socioeconomic status or occupational prestige; anyone who is a member of the relevant society is likely to be subject to them. And institutionally, organizations possess the capacity to label and deal with individuals as *deviants*. A prison has the power to label, and treat an inmate as, a *convict*; a school, college, and university possess the power to judge student a *failure* – a loser, an educational flop; the psychiatric profession, both individually and

G. Bruinsma, D. Weisburd (eds.), *Encyclopedia of Criminology and Criminal Justice*,
DOI 10.1007/978-1-4614-5690-2,

collectively, dispense diagnoses of schizophrenia, autism, and bipolar disorder that can have consequences for the labelee as momentous as the conditions themselves. Hence, labeling tends to be *asymmetrical*: Although audiences with equal power and influence can label one another, vertically, the most consequential deviance-labeling processes flow from institutions to individuals who are so labeled.

The Emergence of Constructionism

Hints of the central concepts of deviance-labeling can be found in the works of Émile Durkheim, in *Suicide* and *The Elementary Forms of the Religions Life*; nonetheless, most scholars locate the roots of the labeling theory of deviance in the pragmatic school of George Herbert Mead (1863–1931). Pragmatism denies the significance of mysticism and essentialism, emphasizing instead that *the meaning is in the response* – what defines something is not its abstract, indwelling "isness," material or spiritual, but the concrete, identifiable consequences it has, the results it affects.

The connection between pragmatism and the perspective that defines deviance as a consequence of labeling is obvious. Rather than regarding deviance as a type of action with objective features, the labeling perspective views the violation of rules as an *infraction*, that is, what *makes* certain actions (and beliefs and conditions) infractions. Why are rules constructed and enforced? Who makes and forces the rules? Why are *certain kinds* of rules made? Why are certain *persons* or *types of persons* apprehended and punished? What *consequences* do rule-making and rule-enforcement have? This approach turns the focus of attention around. Now the spotlight is not on the rule-violator or the conditions that make for rule violation but on the society and the groups in the society that *make and enforce the rules*. And rules take on meaning only insofar as they are applied; deviant behavior is what tends to attract punishment, condemnation, stigma, censure; a deviant person is someone whose identity is saturated with public scorn.

Labeling or Interactionist Theory

In 1938, Tannenbaum published the volume *Crime and the Community*, which argued that in a slum area, nearly all boys engage in a wide range of mischievous, sometimes illegal behavior – getting into fights, skipping school, stealing apples, throwing rocks at windows. These actions, taken for granted by the boys themselves, are often regarded as deviant, even criminal, by the authorities – by the teachers, the police, and the courts. The police may admonish, informally punish, or arrest these boys. If these boys persist in this behavior, they may be sent to reform school. However, punishment could have the unintended, undesired, and ironic effect of escalating the seriousness of the deeds that these boys commit. Arrest and incarceration often result in the community regarding a boy as incorrigible, rebellious, unmanageable – a deviant. By being treated as a delinquent and forced to associate with slightly older and more experienced young criminals in reform schools, the troublemaker may come to adopt the identity of the delinquent. In all likelihood, this will escalate his deviant career – increasing the chance that he will go on to a life of crime. Labeling creates major crimes out of minor sins. Tannenbaum also emphasized that social characteristics – specifically social class – play a role in deviance labeling. Though he added labeling to the roster of the causes of deviance, Tannenbaum did not deny that other factors caused delinquency. *Crime in the Community* did not address the social construction of deviance, a central tenet of labeling theory; hence, Frank Tannenbaum is a *precursor* of labeling theory.

In 1951, Edwin Lemert published a textbook with the anachronistic title, *Social Pathology* (1951); Tannenbaum does not appear among its author index. Lemert distinguished between *primary* and *secondary* deviation. Primary deviation is simply the enactment of deviant behavior itself – any form of it. Lemert argued that primary deviation is *polygenetic* (1951, pp. 75–76) – caused by a wide range of factors. For instance, someone may drink heavily for a variety of reasons – the death of a loved one, a business failure,

belonging to a group whose members call for heavy drinking, growing up in a subculture or a society in which heavy drinking is taken for granted. In fact, Lemert asserted, the original causes of a particular form of deviance is not especially important, and pursuing them, not especially fruitful. What counts is the social reaction *to* the behavior. Lemert's treatise represented a major departure from the mainstream of essentialistic/positivistic, or scientific cause-and-effect, reasoning about deviance.

Secondary deviation occurs when the individual who enacts deviant behavior deals with the problems created by social reactions *to* his or her primary deviations (1951, p. 76). "The secondary deviant, as opposed to his [or her] actions, is a person whose life and identity are organized around the facts of deviance" (1972, p. 63). When someone is isolated, singled out, stigmatized, or condemned for engaging in deviant behavior, it becomes necessary to *deal with* and *manage* this social reaction in certain ways. One comes to see oneself in a certain way, define oneself in different terms, adopt different roles, associate with different individuals. Being stigmatized forces one to become a deviant – to engage in secondary deviation. The concept of "secondary deviation" does not *necessarily* imply that labeling causes more frequent enactment of the behavior that generated the label, but it is more likely than in the absence of labeling.

During the late 1950s, Howard Becker circulated a manuscript, along with four previously published papers, that constituted the core of *Outsiders*. He mentions that he wrote the first draft of the volume without having read or cited Lemert's book (Debro 1970, p. 165), and so his reference to *Social Pathology* in the published version of this book (p. 9) was tacked on after the fact – in effect, a *bogus genealogy*. In the 1960s, Becker, along with a small group of like-minded researchers, produced a small body of work that exerted an enormous influence on the sociological approach to deviance; it came to be looked upon as a more or less unified perspective that is widely referred to as *labeling theory*. Labeling theory grew out of a more general perspective in sociology called *symbolic interactionism*. The interactionist approach is based on "three simple premises." First, people act on the basis of the *meaning* that things have for them. Second, this meaning grows out of *interaction* with others, especially intimate others. And third, meaning is continually modified by *interpretation* (Blumer 1969, p. 2). These three principles – meaning, interaction, and interpretation – form the core of symbolic interactionism and likewise of labeling theory as well. People are not simple "products" of their upbringing or socialization or of their environment, but they are active and creative in how they see and act on things in the world and arrive at what they think, how they feel, and what they do through a dynamic, creative process. All behavior, deviance included, is an interactional product; its properties and impact cannot be known until we understand how it is defined, conceptualized, interpreted, apprehended, and evaluated – in short, what it *means* to participants and relevant observers alike. Labeling theory is not a separate theory but a direct application of symbolic interactionism to phenomena than are designated as deviant.

According to Becker (1973, pp. 177–208) and Kitsuse (1972), labeling theory is not so much an explanation of why certain individuals engage in deviant behavior as it is a perspective whose main insight tells us that the labeling process is crucial and cannot be ignored. And labeling "theory" is not so much a theory as it is an orientation perspective, a set of useful concepts with no clear-cut propositions. In fact, most "labeling theorists" preferred the term, "the interactionist approach to deviance" to the easy-to-remember tag their perspective was stuck with – "labeling theory" (Becker 1973) – here we have an irony that even labeling theory came to be labeled. The labeling approach shifts attention away from the traditional question of "Why do they do it?" to a focus on how and why judgments of deviance come to be made and what their consequences are. What consequences does labeling have for stigmatization? What is the difference between enacting rule-breaking behavior which does not result in getting caught and enacting that same behavior and being publicly denounced for it?

These are some of the major issues labeling theorists have concerned themselves with.

In many ways, labeling theory is a model or quintessential example of the constructionist approach. It addresses issues such as the creation of deviant categories, the social construction of moral meanings and definitions, social and cultural relativity, the how and why of social control, the politics of deviance, the criminalization of behavior, and the role of contingency in the labeling process. Together, these issues constitute the foundation stone of constructionism. Several issues or concepts represent the hallmark of the labeling theory's central concerns: *audiences, labeling and stigma*, *reflexivity*, and *the "stickiness" of labels* and *the self-fulfilling prophecy*.

Audiences. An audience is an individual or any number of individuals who observe and evaluate an act, a condition, or an individual. An audience could be one's friends, relatives, or neighbors, coworkers, the police, teachers, a psychiatrist, bystanders or observers – even oneself, for one can be an observer and an evaluator of one's own behavior or condition (Becker 1963, p. 31). *Audiences* determine whether something or someone is deviant: no audience, no labeling, therefore, no deviance. However, an audience need not *directly* view an act, condition, or person; audiences can witness behavior or conditions "indirectly," that is, they can hear or be told about someone's behavior or condition, or they can simply have a negative or condemnatory attitude toward a class or category of behavior: "The critical variable in the study of deviance . . . is the social audience rather than the individual actor, since it is the audience which eventually determines whether or not any episode of behavior *or any class of episodes* is labeled deviant" (Erikson 1964, p. 11; my emphasis). In other words, audiences can evaluate *categories* of deviance and stand ready to condemn them, even before they have actually witnessed specific, concrete cases of these categories. Audiences are absolutely central in the sociological definition of deviance. Whether an act, a belief, or a trait is deviant or not depends on the audience who does or would evaluate and react to the actor, the believer, or the possessor accordingly. Without specifying real-life audiences, the question of an act's, a belief's, or a trait's deviance is meaningless. Audiences include the society at large, agents of formal social control, and the significant others of the actor, such as intimates – or any minority collectivity within a given society. Different audiences may or may not evaluate or react to the actor's behavior in the same way.

Labeling and stigma. The key elements in "becoming" deviant are labeling and stigma. The processes of labeling and stigmatizing are done by a relevant audience. The audience is relevant according to the circumstances or context. Gang members can label the behavior of a fellow member of the gang, for instance, the refusal to fight, as deviant *within the gang context*; the police can label an action of a gang member, for instance, fighting, as deviant, wrong, or illegal, by arresting or harassing him. Each and every audience or person can label each and every action, belief, or condition of each and every person as deviant – but the weight or *consequences* of that labeling process vary according to the context, as we saw in considering the *vertical* conception of deviance labeling.

The labeling or stigmatization process entails two steps. First, an audience labels an *activity* (or belief or condition) deviant, and second, it labels a specific *individual* as *a* deviant. In these two labeling processes, if no audience labels or would label a given person or someone deviant, strictly speaking, *no deviance exists*. An act, belief, condition, or person cannot be deviant *in the abstract*, that is, without reference to how an audience does or would label it. Something or someone must be defined as such by the members of a society or a group *as* deviant – it must be *labeled*, concretely or potentially, as reprehensible or wrong. An act, belief, or condition need not be *actually* or *concretely* labeled to be regarded as deviant, however, but it is deviant if it belongs to a category of similar actions, beliefs, or conditions. In other words, *we already know* that the public regards shooting the proprietor of a store and taking the contents of that store's cash register as deviant. Even if the robber gets away with

the crime, *if known about*, the act is likely to be regarded as deviant in the society at large – that is, it is an instance of "societal deviance." At the same time, the role of *contingencies* – who, what, where, why, and so on – may influence the outcome of the labeling process.

Labeling involves attaching a *stigmatizing* definition to an activity, a belief, or a condition. Stigma is a stain, a sign of reproach or social undesirability, an indication to the world that one has been singled out as a shameful, morally discredited human being. Someone who has been stigmatized is a "marked" person; he or she has a "spoiled identity." Once someone has been thereby discredited, relations with conventional, respectable others become difficult, strained, problematic. In other words, "being caught and branded as a deviant has important consequences for one's further participation and self-image. . . . Committing the improper act and being publicly caught at it places [the individual] in a new status. He [or she] has been revealed as a different kind of person from the kind he [or she] was supposed to be. He [or she] is labeled a 'fairy,' 'dope fiend,' 'nut,' or 'lunatic,' and treated accordingly" (Becker 1963, pp. 31, 32).

So crucial is this labeling process that, in some respects, it does not necessarily matter whether or not someone who has been stigmatized has actually engaged in the behavior of which he or she is accused. According to the logic of labeling theory, *falsely accused* deviants – if the accusation sticks – are still deviants (Becker 1963, p. 20). In many important respects, they resemble individuals who really *do* commit acts that violate the rules. For example, women and men burned at the stake for the crime of witchcraft in the fifteenth and sixteenth centuries were deviants in the eyes of the authorities and the community, even though they clearly did not engage in a pact with the devil. Two individuals, one who engaged in a deviant act and the second of whom is falsely accused, will share important experiences and characteristics in common, *by virtue of the labeling process alone*, even though they are poles apart with respect to having committed the behavior of which they were accused. While their lives are unlikely to be *identical* simply because both are seen by the community as deviants, the similarities they share are likely to be revealing.

Reflexivity. Reflexivity means looking at oneself in part through the eyes of others. It is what is widely referred to, although too mechanistically, as the "looking glass self." Labeling theory is based on a seemingly simple but fundamental observation: As Mead and his pragmatic peers said, we tend to see ourselves through the eyes of others, and when others see us in a certain way, we tend to begin seeing ourselves that way, too. In other words, deviance labeling by others, if those others are sufficiently influential and the labeling persists long enough, may become *internalized*.

Both direct *and* indirect, or concrete *and* symbolic, labeling operate in the world of deviance. "Indirect" or "symbolic" labeling is the awareness by a deviance enactor that his or her behavior is saturated with public scorn, his or her identity is potentially discreditable, that he or she *would be* stigmatized if discovered. People who violate norms have to deal with the probable and potential, as well as the actual and concrete, reactions of the respectable, conventional, law-abiding majority. All violators of major norms must at least ask themselves how others react to them and their behavior. If the answer is that others will condemn and humiliate them, then the rule breaker must try to avoid detection, remain within deviant or minority circles, or be prepared to be punished and stigmatized.

The "stickiness" of labels and *the self-fulfilling prophecy*. Labeling theorists argue that stigmatizing someone as a socially and morally undesirable character has important consequences for that person's further rule-breaking. Under certain circumstances, being labeled may intensify one's commitment to a deviant identity and contribute to further deviant behavior. Some conventional, law-abiding citizens believe, "once a deviant, always a deviant." Someone who has been stigmatized and labeled "is ushered into the deviant position by a decisive and often dramatic ceremony, yet is retired from it with hardly

a word of public notice." As a result, the deviant is given "no proper license to resume a normal life in the community. Nothing has happened to cancel out the stigma imposed upon him" or her. The original judgment "is still in effect." The conforming members of a society tend to be "reluctant to accept the returning deviant on an entirely equal footing" (Erikson 1964, pp. 16, 17).

Deviant labels tend to be "sticky." The community tends to stereotype someone as, above all and most importantly, a deviant. When someone is identified as a deviant, the community asks, "What kind of person would break such an important rule?" The answer that is given is "one who is different from the rest of us, who cannot or will not act as a moral being and therefore might break other important rules" (Becker 1963, p. 34). Deviant labeling is widely regarded as a quality that is "in" the person, an attribute that is carried wherever he or she goes; therefore, it is permanent or at least long lasting. Deviant behavior is said to be caused by an indwelling, essentialistic trait; it is not seen as accidental or trivial, but a fixture of the individual. Once a deviant label has been attached, it is difficult to shake. Ex-convicts find it difficult to find legitimate employment upon their release from prison; once psychiatrists make a diagnosis of mental illness, hardly any amount of contrary evidence can dislodge their faith in it; ex-mental patients are carefully scrutinized for odd, eccentric, or bizarre behavior.

Such stigmatizing tends to deny to deviants "the ordinary means of carrying on the routines of everyday life open to most people. Because of this denial, the deviant must of necessity develop illegitimate routines" (Becker 1963, p. 35). As a consequence, the labeling process may actually increase the deviant's further commitment to deviant behavior. It may limit conventional options and opportunities, strengthen a deviant identity, and maximize participation in a deviant group. Labeling someone, thus, may become "a self-fulfilling prophecy" (Becker 1963, p. 34) in that *someone becomes what he or she is accused of being* – even though that original accusation may have been false (Merton 1948).

Labeling Theory Today

Labeling theory left two legacies to the contemporary study of deviance. The first, its "major" mode, which Plummer refers to as its "broader" version (1979, p. 88, 2011, pp. 84–85), was its constructionist vision. Other, earlier approaches were careful to point out that deviance and crime were a matter of violating rules, norms, and laws, which are socially constructed and vary somewhat historically and culturally. But labeling theory stressed and highlighted this point more forcefully. Indeed, it went further and emphasized that definitions of wrongdoing vary not only from society to society but from one *category* or *social context* to another. This remains a basic and crucial assumption in all sociological work on deviance. The second legacy of labeling theory, its "minor" mode (which, unfortunately, critics stress as its main point) – which Plummer refers to as its "narrow" version (2011, pp. 83–84) – is its argument about the causal mechanism of deviance: Being labeled as a wrongdoing inevitably or usually leads to a strengthening of a deviant identity and hence, an escalation in the seriousness and frequency of deviant behavior. This argument is as often wrong as it is right; its lack of empirical verification should not negate the perspective's "major" mode or constructionist legacy.

The foundational works of labeling theory were published in the 1960s; the number of citations or "hits" in Harzing's "Publish or Perish: Google Scholar" to "labeling theory" increased from 85 per year in the 1965–1969 period to over 825 in 1970–1974, then peaked in the 1990s (5,720 per year in 1990–1994 and 5,660 in 1995–1999), and declined into the 2000s. In the 1960s, the field's younger scholars and researchers yearned for a fresh, unconventional, and radically different way of looking at deviance. At the same time, the labeling perspective was immediately and subsequently widely and vigorously attacked, and many of these criticisms stuck; common wisdom has it that, today, both labeling theory and the sociology of deviance are dead or dying (Sumner 1994; Best 2004). Eventually, researchers generated competing

perspectives, and, in reaction to critiques, the perspective's supporters modified or adapted labeling theory's insights. Currently, no single approach or paradigm dominates the study of deviance in the way that labeling theory did circa 1970–1974. What we see now is diversity, fragmentation, and theoretical dissensus. In spite of the criticisms, however, the labeling school left a legacy to the field that even its critics incorporate into their work, albeit, for the most part, implicitly.

By the 2000s, the central insights of labeling theory have become so taken for granted, so densely interwoven into the conventional wisdom of criminology and the sociology of deviance – a kind of "quiet orthodoxy" that appears in "different guises" (Plummer 2001, pp. 193–194) – that its place in these fields offers a case of "obliteration by incorporation" (Merton 1979). In other words, "the central strands of the perspective live on in cognate areas of inquiry" (Grattet 2011a, p. 186). Ongoing research has demonstrated that the consequences of negative labeling tend to be long lasting and often dire. Grattet's summary of this literature is most revealing (2011a, b). Matsueda's study of troublesome boys reveals that parental definitions ("informal social control") often results in self-conceptions that increase the likelihood of further delinquencies (1992). The research of Bruce Link and his associates on mental disorder likewise demonstrates the baleful impact of stigma and deviance labeling. Working with a "modified labeling theory," Link uncovered how mental illness processing agencies reinforce "perceptions of patient dangerousness" and put social distance between themselves and the patient, making their conditions more serious (Link et al. 1989). Sampson and Laub test the hypothesis of "cumulative disadvantage" (Grattet 2011b, p. 124) – that criminal justice sanctioning commonly results in offenders repeating and increasing the seriousness of their involvement in offending over the life course. Sampson and Laub's contention is that there is only "one theoretical position in criminology that is inherently developmental in nature – labeling theory" (1997, p. 3). Cumulative disadvantage represents a kind of "snowballing effect" which increasingly "mortgages" the offender's future, especially when negative evaluations in the realms of school and employment further reduce their life chances. For instance, convicted felons face increasingly difficult conditions for reintegrating into civil society, disenfranchising them and making the choice of further criminal activity increasingly attractive; negative labeling by work settings, marriage, and family dynamics all make desistance from crime and wrongdoing increasingly difficult (Petersilia 2003; Uggen and Manza 2006; Western 2006). A criminal record has a powerful chilling effect on employment outcomes. Pager introduces the concept of "negative credentials" to stress this process; these are the "official markers that restrict access and opportunity rather than enabling them" (2007, p. 32). As Grattet argues (2011a, b), recent research powerfully argues for the ongoing influence of the labeling/interactionist tradition in the study of crime and deviance.

Related Entries

- History of Criminological Theories: Causes of Crime
- Labeling and Deviance
- Social Control Theory of Sexual Homicide Offending

Recommended Reading and References

Becker HS (1963) Outsiders: studies in the sociology of deviance. Free Press, New York

Becker HS (ed) (1964) The other side: perspectives on deviance. Free Press, New York

Becker HS (1973) Labeling theory reconsidered. In: Becker HS (ed) Outsiders: studies in the sociology of deviance, (2nd ed). Free Press, New York, pp 177–212

Best J (2004) Deviance: career of a concept. Wadsworth, Belmont, CA

Blumer H (1969) Symbolic interactionism. Prentice-Hall, Englewood Cliffs, NJ

Debro J (1970) Dialogue with Howard S. Becker. Issues Criminol 5(Summer):159–179

Erikson KT (1964) Notes on the sociology of deviance. In: Becker HS (ed) The other side: perspectives on deviance. Free Press, New York, pp 307–314

Grattet R (2011a) Societal reactions to deviance. Annual Rev Sociol 37:185–204
Grattet R (2011b) Labeling theory. In: Bryant CD (ed) The Routledge handbook of deviant behavior. Routledge, London/New York, pp 121–128
Kitsuse JI (1972) Deviance, deviant behavior, and deviants: some conceptual problems. In: Filstead WJ (ed) An introduction to deviance: readings in the process of making deviants. Markham, Chicago, pp 233–243
Lemert EM (1951) Social pathology: a systematic approach to the theory of sociopathic behavior. McGraw-Hill, New York
Lemert EM (1972) Human deviance, social problems, and social control (2/e). Prentice-Hall, Englewood Cliffs, NJ
Link BG, Cullen FT, Struening E, Shrout P, Dohrenwend BP (1989) A modified labeling theory approach to mental disorders: an empirical assessment. Am Sociol Rev 54(June):400–423
Matsueda RL (1992) Reflected appraisals, parental labeling, and delinquency: specifying a symbolic interactionist theory. Am J Sociol 97(May):1577–1611
Merton RK (1948) The self-fulfilling prophecy. Antioch Rev 7(Summer):193–210
Merton RK (1979) Foreword. In: Eugene Garfield (ed) Citation indexing: its theory and application in science, technology and humanities. Wiley, New York, pp. ix–x
Pager D (2007) Marked: race, crime, and finding work in an era of mass incarceration. University of Chicago Press, Chicago
Petersilia J (2003) When Prisoners Come Home: Parole and Prisoner Reentry. Oxford University Press, New York
Plummer K (1979) Misunderstanding labelling perspectives. In: Downes D, Rock P (eds) Deviant interpretations. Martin Robinson, Oxford, UK, pp 85–121
Plummer K (2001) Labeling theory. In: Bryant CD (ed) Encyclopedia of criminology and deviant behavior, vol I. Brunner-Routledge/Taylor & Francis, New York, pp 191–194
Plummer K (2011) Labelling theory revisited: forty years on. In: Peters H, Dellwing M (eds) Langweiliges Verbrechen. VS Verlag, Wiesbaden, Germany, pp 83–103
Sampson RJ, Laub JH (1997) A life-course theory of cumulative disadvantage and the stability of delinquency. In: Thornberry TP (ed) Developmental theories of crime and delinquency. Transaction, New Brunswick, NJ, pp 133–161
Sumner C (1994) The sociology of deviance: an obituary. Open University Press, London
Tannenbaum F (1938) Crime and the community. Ginn, New York
Uggen C, Manza J (2006) Locked out: Felon disenfranchisement and American democracy. Oxford University Press, New York
Western B (2006) Punishment and inequality in America. Russell Sage Foundation Press, New York

Labeling: History and Concept

▶ Cultural Criminology

Labelling Perspective

▶ Labelling, Deviance, and Media

Labelling Theory

▶ Labelling, Deviance, and Media

Labelling, Deviance, and Media

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Synonyms

Labelling perspective; Labelling theory

Overview

The labelling perspective emerged as a distinctive approach to criminology during the 1960s and was a major seedbed of the radical and critical perspectives that became prominent in the 1970s. It represented the high point of an epistemological shift within the social sciences away from positivism – which had dominated criminological enquiry since the late 1800s – and toward an altogether more relativistic stance on the categories and concepts of crime and control. It inspired a huge amount of work throughout the 1960s and 1970s and still resonates powerfully today. This short entry maps out some of the ways

in which labelling, deviance, media, and justice interact at the levels of definition and process. It presents an overview and analysis of key mediatized labelling processes, such as the highly influential concept of moral panics. It discusses how the interconnections between labelling, crime, and criminal justice are changing in a context of technological development, cultural change, and media proliferation. The conclusion offers an assessment and evaluation of labelling theory's long-term impact on criminology.

The Roots of the Labelling Perspective

The labelling perspective emerged at a time of radical intellectual change in the 1960s. The intellectual problem, as labelling theorists saw it, was that the study of crime had narrowed into two key questions: (1) Why do they do it and (2) how do we stop them from doing it? Government bodies and funding agencies reinforced the notion that "they" were different from "us," and that "crime" was entirely distinct from "criminal justice." Such thinking had laid foundations for the resurgence of a separate academic discipline of "positivist criminology," which functioned as policy science of crime, the criminal and crime control. There was an assumed consensus over what constituted crime, and the operations of criminal justice were seen as of interest only in terms of making them more effective in controlling crime. Yet nobody appeared to be asking why some behaviors were deemed criminal in certain contexts, while others were not. And why some people were deemed deviant and in need of correction or punishment, while others – who engaged in similar behaviors – were not.

Though Durkheim had discussed the problematic definition of crime in the late nineteenth century (Durkheim 1895/1964, pp. 69–72), and scholars such as Frank Tannenbaum, George Herbert Mead, and W. I. Thomas had been writing more or less directly about labelling processes since the 1930s, it is Howard Becker's (1963) *Outsiders: Studies in the Sociology of Deviance* that has become the best known and most influential statement of labelling theory. Building on the theoretical foundations of social constructionism and symbolic interactionism, Becker sought to problematize systematically precisely those questions that mainstream "correctionalist" criminology left unexplored. He argued (1963, p. 14), "The same behaviour may be an infraction of the rules at one time and not at another; may be an infraction when committed by one person, but not when committed by another; some rules are broken with impunity, others are not. In short, whether a given activity is deviant or not depends in part on the nature of the act (that is whether or not it violates some rule) and in part on what other people do about it."

Understanding the highly selective nature of labelling, the equally selective nature of the social reaction to which it may or may not give rise, and the consequences for those who are labelled required analyzing complex and contested power relations as both micro-interactional and macro-social processes. For Edwin Schur (1979, p. 160, italics in original), the labelling perspective is thus concerned with both "*definition* and *process* at all the levels that are involved in the production of deviant situations and outcomes. Thus, the perspective is concerned not only with what happens to specific individuals when they are branded as deviant ('labeling' in the narrow sense) but also with the wider domains and processes of social definitions and collective rule-making that frequently lie behind such concrete applications of negative labels."

Key questions for labelling theorists therefore include the following: How are labels created or socially constructed? How are labels imposed? How and why do particular behaviors become defined as "normal" or "deviant"? What enables labellers to impose their particular definitions upon behaviors, actions, and situations? How does the labelling process work and with what consequences?

Key Issues/Controversies

Labelling, Media, and Crime

The mass media play at least a subordinate role in all the major theoretical perspectives attempting to understand crime and criminal justice. To illustrate this, the predominant theories of crime can

be assembled in a simple model. For a crime to occur, there are five logically necessary preconditions, which can be identified as labelling, motive, means, opportunity, and the absence of controls (Reiner 2007, pp. 80–90). The media potentially play a part in each of these elements and thus can affect levels of crime in a variety of ways (Greer and Reiner 2012, pp. 256–61).

Labelling

For an act to be "criminal" (as distinct from harmful, immoral, antisocial, etc.), it has to be labelled as such. This involves the creation of a legal category. It also requires the perception of the act as criminal by citizens and/or law enforcement officers if it is to be recorded as a crime. The media are an important factor in both processes, helping to shape the conceptual boundaries and recorded volume of crime.

The role of the media in helping to develop new (and erode old) categories of crime has been emphasized in most of the classic studies of shifting boundaries of criminal law within the "labelling" tradition. Becker's (1963) seminal book *Outsiders* analyzed the emergence of the Marijuana Tax Act in the USA in 1937, emphasizing the use of the media as a tool of the Federal Bureau of Narcotics and its moral entrepreneurship in creating the new statute. Since this pioneering work many studies have illustrated the crucial role of the media in shaping the boundaries of deviance and criminality, by creating new categories of offense or changing perceptions and sensitivities, leading to fluctuations in apparent crime (Young 1971; Cohen 1972; Hall et al. 1978). For example, Roger Graef's celebrated 1982 fly-on-the-wall documentary about the Thames Valley Police was a key impetus to reform of police treatment of rape victims (Greer and Reiner 2012, p. 256). This also contributed, however, to a rise in the proportion of victims reporting rape and thus an increase in the recorded rate. Many other studies document media-amplified "crime waves" and "moral panics" about law and order (Goode and Ben-Yehuda 2009).

What all these studies illustrate is the significant contribution of the media to determining the apparent level of crime. Increases and (perhaps more rarely) decreases in recorded crime levels are often due in part to the deviance construction and amplifying activities of the media.

Motive

A crime will not occur unless there is someone who is tempted, driven, or otherwise motivated to carry out the "labelled" act. The media feature in many of the most commonly offered social and psychological theories of the formation of criminal dispositions. Probably the most influential sociological theory of how criminal motives are formed is Merton's version of *anomie* theory (Merton 1938/1957), echoes of which are found in more recent work (see Special Issue of *Theoretical* Criminology 11/1 2007; Reiner 2007, pp. 14–5, 84–5). The media play a key role in these accounts of the formation of anomic strain generating pressures to offend. The media are pivotal in presenting for universal emulation images of affluent lifestyles, which accentuate relative deprivation and generate pressures to acquire ever higher levels of material success regardless of the legitimacy of the means used.

Psychological theories of the formation of motives to commit offenses also often feature media effects as part of the process (Greer and Reiner 2012, pp. 247–62). It has been claimed that the images of crime and violence presented by the media are a form of social learning and may encourage crime by imitation or arousal effects. Others have argued that the media tend to erode internalized controls by disinhibition or desensitization through witnessing repeated representations of deviance ().

Means

It has often been alleged that the media act as an open university of crime, spreading knowledge of criminal techniques. This is often claimed in relation to particular *causes célèbres* or horrific crimes, for example, during the 1950s campaign against crime and horror comics. A notorious case was the allegation that the murderers of Jamie Bulger had been influenced by the video *Child's Play 3* in the manner in which they killed the unfortunate toddler. A related line of

argument is the "copycat" theory of crime and rioting. Despite a plethora of research and discussion, the evidence that this is a major source of crime remains weak.

Opportunity

The media may increase opportunities to commit offenses by contributing to the development of a consumerist ethos, in which the availability of tempting targets of theft proliferates. The domestic hardware and software of mass media use – TVs, videos, radios, CDs, personal computers, and mobile phones – are the common currency of routine property crime, and their proliferation has been an important aspect of the spread of criminal opportunities.

Absence of Controls

Motivated potential offenders, with the means and opportunities to commit offenses, may still not carry out these crimes if effective social controls are in place. These might be *external* – the deterrent threat of sanctions represented in the first place by media made criminality the police – or *internal*, the still, small voice of conscience, what Eysenck has called the "inner policeman."

A regularly recurring theme of respectable anxieties about the criminogenic consequences of media images of crime is that they erode the efficacy of both external and internal controls. They may undermine external controls by derogatory representations of criminal justice, for example, ridiculing its agents, a key complaint at least since the days of Dogbery, resuscitated in this century by the popularity of comic images of the police, from the Keystone Cops onward. Serious representations of criminal justice might undermine its legitimacy by becoming more critical questioning, for example, the integrity and fairness or the efficiency and effectiveness of the police. Negative representations of criminal justice could lessen public cooperation with the system, or potential offenders' perception of the probability of sanctions, with the consequence of increasing crime.

Probably the most frequently suggested line of causation between media representations and criminal behavior is the allegation that the media undermine internalized controls, by regularly presenting sympathetic or glamorous images of offending. In academic form this is found in the psychological theories about disinhibition and desensitization, which were referred to in the section above on the formation of motives. In sum, there are several possible links between media representations of crime and criminal behavior which are theoretically possible and frequently suggested in criminological literature and political debate. In the next section I will review some of the research evidence examining whether such a link can be demonstrated empirically.

Labelling, Media, and Moral Panics

The successful labelling of a particular situation or set of conditions as deviant and in need of amelioration can, in the extreme, result in "moral panic." The term was first used by Young (1971) in his study of subcultures and drugtaking. Cohen (1972) developed and extended the concept in his analysis of the sensationalistic, heavy-handed, and ultimately "disproportionate" reaction to the mods and rockers disturbances in an English seaside resort in 1964. Though the damage was in financial terms minor, Cohen traces the spiralling social reaction through initial intolerance, media stereotyping, moral outrage, increased surveillance, labelling and marginalization, and deviancy amplification leading to further disturbances that seemed to justify the initial concerns. The flamboyant misbehavior of youth subcultures, independent and sexually and economically liberated, affronted the postwar values of hard work, sobriety, and deferred gratification. At a time of rapid social change, they were a visible index of a world that was slipping away – "folk devils" who provided a crystallizing focus for social anxiety and "respectable fears." Cohen used the building blocks of labelling theory – social constructionism, symbolic interactionism, deviancy amplification, and social psychology – but also incorporated the lesser known academic literature on "disaster research" to describe the various phases of a moral panic, warning, impact, inventory, and reaction and chart its progression.

Hall et al. (1978) politicized the concept by locating it within a broader political economy perspective in their analysis of a "mugging" moral panic which, they argued, was constructed to address an escalating crisis in state hegemony. Drawing from an eclectic mix of influences, their account connects "new deviancy theory, news media studies and research on urban race relations with political economy, state theory and notions of ideological consent" (McLaughlin 2008, p. 146). For some critical criminologists, it represents the high point of Marxist theorizing about crime, law and order, and the state. While fully acknowledging the sophistication of this work, Cohen (2011) has nonetheless noted a wider tendency to over-politicize the concept at the expense of its sociological meaning and application. Hall (2007) has suggested in response that politicization was a necessary developmental stage and that the full explanatory potential of the moral panic concept was, in fact, only realized through its construction as ideology.

Goode and Ben-Yehuda (2009) developed Cohen's discussion of moral panic by paying particular attention to the criteria that should be in place before it can be suggested that a "moral panic" is occurring. They identify five key features of the phenomenon: (a) *concern* (a reported condition or event generates anxiety), (b) *hostility* (the condition or event is condemned and, where there are clearly identifiable individuals who can be blamed, these are labelled as "folk devils"), (c) *consensus* (the negative social reaction is widespread and collective), (d) *disproportionality* (the extent of the problem and the threat it poses are exaggerated), and (e) *volatility* (media attention and the associated panic emerge suddenly and with intensity, but can dissipate quickly too). Media are central to all of these.

"Moral panic" is one of the most widely used terms in the sociological analysis of crime and justice and has transcended academic discourses to become commonplace in political rhetoric and popular conversation (Altheide 2009). Given its prolific usage, it is surprising that few commentators have subjected the concept to sustained and rigorous critical investigation. With the split in the criminological left in the late 1970s, the concept was dismissed by left realists as "left idealism" and accused of obfuscating the painful "realities" of criminal victimization by propagating the view that "the crime problem" is socially constructed (Young 1979). In exploring the anatomy of the concept, critics have queried the notions of "disproportionality" and "volatility": first, since this assumes a superior knowledge of the objective reality of the issue against which the reaction is measured and a corresponding assumption of what a "proportionate" reaction would look like. Second, because in a contemporary multimedia world characterized by ontological insecurity and state of a permanent free-floating anxieties, the notion of discreet, self-contained, and volatile moral panics may need some rethinking (McRobbie and Thornton 1995). Cohen has responded to all of these criticisms. But such critical interventions, both from within and outside of criminology, have barely interrupted the general tendency to arbitrarily apply the concept to explain everything from global warning to "swine flu." The broadly uncritical application of the moral panic concept has led Garland (2008) to reassert two elements of the original analysis, which are absent from many contemporary studies: (a) the *moral dimension* of the social reaction – most issues can be moralized, but many are not in and of themselves "moral" and cannot automatically be analyzed as such – and (b) the idea that the deviant conduct in question is somehow *symptomatic* of a wider problem, a threat to established values, or a particular way of life. Struggles over the power to label and to label effectively via media discourses, of course, remain fundamental to the moralization of particularly "social problems," the identification of folk devils, the persuasive representation of threats to particular forms of social existence, and the prescription of ameliorative action.

Labelling and Trial by Media

Another way in which the news media are directly involved in labelling is the phenomenon of "trial by media" (Greer and McLaughlin 2011,

2012a). "Trial by media" can be defined as a dynamic, impact-driven, news media-led process by which individuals – who may or may not be publicly known – are tried and sentenced in the "court of public opinion." The targets and processes of "trial by media" can be diverse and may range from prejudging the outcome of formal criminal proceedings against "unknowns" to the relentless pursuit of high-profile celebrity personalities and public figures deemed to have offended in some way against an assumed common morality.

Despite their clear diversity, such "trials" share certain core characteristics. In each case, the news media behave as a proxy for "public opinion" and seek to exercise parallel functions of "justice" to fulfill a role perceived to lie beyond the interests or capabilities of formal institutional authority. Due process and journalistic objectivity can give way to sensationalist, moralizing speculation about the actions and motives of those who stand accused in the news media spotlight. Judicial scrutiny of "hard evidence" yields ground to "real-time" dissemination of disclosures from paid informants and hearsay and conjecture from "well-placed sources." Since the news media substitute for the prosecution, judge, and jury, the target may find themselves rendered defenseless. The default position is "guilty until proven innocent." Those found "guilty" will be subjected to righteous "naming and shaming" followed by carnivalesque condemnation and ridicule. The public appeal of "trial by media" is evidenced by increased circulation and web traffic. And by no means is it restricted to the British press.

Thus, in recent years police commissioners, senior politicians, banking executives, and, in the UK, the entire political establishment, as well as countless members of the public who are suspected of, but not yet charged with, any range of alleged criminal activities, have been subjected to mediatized scandal and trial by media (Greer and Mclaughlin 2010, 2011, 2012a, 2012b). The results of such high-profile labelling and public shaming, depending on the target, can range from deep and lasting reputational damage, public apologies, high-level resignations, radical political reform, or criminal proceedings.

Labelling, Media, and Criminal Justice

Powerful organizations and institutions tend to hold a distinct advantage in defining the nature of reality as represented via news media. Despite considerable variation in theoretical and methodological approach, decades of research has confirmed that the institutionally powerful enjoys privileged positions as "primary definers" at the top of the "hierarchy of credibility" and that a pro-establishment perspective is structurally and culturally advantaged, if not necessarily guaranteed in news media representations (Ericson et al. 1991; Hall et al. 1978). Historically, then, the power to label has tended to rest more or less firmly in the hands of those who command institutional authority. There is good evidence to suggest, however, that with the proliferation and diversification of media in recent decades, the power of institutional authority to effectively "define how things are" and set the terms of public debate is becoming increasingly contested and unstable.

In a digital multimedia age, a proliferation of news platforms, sites, and formats has been paralleled by a rapidly expanding array of news sources and producers of content, leading to the creation of an unprecedented amount of potentially newsworthy information, and a remarkable number of "news spaces" in which to broadcast/publish it. In the process, increasingly sophisticated, interactive news audiences are reconstituted as consumers – once content to be told what the news is, now increasingly interested in being part of the production process. Armed with cellphones, Blackberries or iPhones, all citizens are potential "citizen journalists." A photo can be taken on a mobile phone, tweeted on Twitter.com, picked up by other users, and disseminated like a virus online. Internet monitoring by mainstream news media outlets means that dramatic amateur photographic, audio or video content can become headline news. Citizen journalism has been instrumental not only in providing newsworthy images but also in defining the news itself – in shaping representations of key

global events. From the police brutality against Rodney King filmed by camcorder in Los Angeles in 1991, to the 7/7 London bombings of 2005, to Hurricane Katrina, street protests in Tehran, and the Haiti earthquake, many of the defining images that now form a key part of the "official record" of events were taken with hand-held recording devices and posted on social media sites. The emergence of the citizen journalist carries significant implications for official institutions that would seek to control the representing of crime and justice in the news. This phenomenon has been seen as a significant modification of existing power relations, offering what has been called "synopticon" (Mathiesen 1997), providing the mass of the population with some potential to record elite deviance.

The police can no longer simply "deny out of existence" incidents of police violence in public protest situations, since these are even more likely to be captured on camera and broadcast to the world (Greer and Mclaughlin 2010, 2012b). The same can be said of governments that would engage in larger scale abuses of their people and seek to conceal this from international scrutiny. And politicians or public officials, who may previously have fiddled expenses, taken bribes, engaged in illicit affairs when they should have been attending to the affairs of state, have all become more "visible" and, thus, more vulnerable to public exposure, labelling, trial by media, and mediatized justice.

The democratization of public involvement with the news production process, and the "new visibility" (Thompson 2005) to which institutional and state authority are continually subjected, is altering the dynamics of "communication power" that shape our constructed realities. Of course, citizen journalists are neither automatically nor naturally imbued with cultural or official authority: They are not "authorized knowers," who command access to mainstream news media "as of right." Their position in the "hierarchy of credibility" is entirely precarious and contingent. Media access is not granted because of who citizen journalists are, but rather because of where they are and what they have. Their credibility and authenticity as news sources derives from their capacity to provide "factual" visual evidence of "live events" which, in a multi-platform news media market, constitutes an important and cost-effective resource for "making news." Nevertheless, citizens are becoming increasingly involved in the processes of public labelling and social construction that determine what, and who, is defined as honest or corrupt, competent or incompetent, legitimate and illegitimate, or compliant or deviant. As such, they are centrally involved in the reconfiguration of notions of "crime" and "justice" in multimedia worlds.

Labelling Theory: Evaluation and Critique

The labelling perspective has transformed criminological theory and practice since the 1960s. It has made many permanently valuable contributions, above all the recognition of criminal law and justice as problematic research areas, that shape at least as much as they control crime. Criminology conferences and textbooks today devote as much attention to research on and analysis of criminal justice, from a non-correctionalist standpoint, as they do to the study of offending, a legacy (albeit often unrecognized) of labelling theory. The two subfields that the authors of this entry have spent most of their careers researching (policing and media representations of crime/criminal justice) were almost entirely absent from criminologists' agendas until the 1960s, and the questions raised then by labelling theorists. The problematic character of crime statistics, now universally recognized, is another contribution of labelling theorists. These impacts reflect the labelling perspective, but its influence is largely unacknowledged, and the developments have come to be taken for granted and domesticated within mainstream criminology.

What is more questionable is the imperialistic version of labelling theory that was trumpeted in its heyday and made large claims about itself as offering a total theory of crime. This grandiose version of labelling theory originated and flourished as the criminology of the 1960s counterculture and could only be plausible as a general theory in that context.

The imperialistic version claimed that concepts of crime were entirely relative and dependent on perceptions and labelling. It further suggested that labelling and social reaction were the principal explanations of crime and deviance. These claims are epitomized by two frequently cited quotes from key architects of the perspective. The relativity assertion is captured by Becker's statement that "deviance is not a quality of the act... but of the application... of rules and sanctions" (Becker 1963). The explanatory power of labelling is asserted most explicitly by Lemert: "Older sociology tended to rest heavily upon the idea that deviance leads to social control... (T)he reverse idea i.e. that social control leads to deviance, is equally tenable and the potentially richer premise for studying deviance in modern society" (Lemert 1967).

Both claims have some validity, but the exaggerated imperialistic versions, postulated by Becker, Lemert, and others, were neither new nor true without considerable qualification. Criminology before labelling theory (and indeed even nowadays) often took the concept of crime for granted. But its problematic character had already been emphasized by Durkheim and others. Seeing the making and enforcement of criminal law as a part of criminology was indeed acknowledged by some criminologists long before the labelling revolution. Moreover, it was assumed by criminal lawyers, both in textbooks and judicial decisions (*Proprietary Articles Trade Assn.* v. *Alt. Gen. for Canada* [1931] AC at 32, per Lord Atkin). Legal scholars had studied the emergence and change of criminal laws long before the advent of labelling theory (e.g., Hall 1935/1952). Recognizing the historical and social diversity of what precisely is criminalized at different times and places (Reiner 2007, Chap. 2; Lacey and Zedner 2012) does not entail complete relativity. As Hart suggested persuasively, there seems to be a "minimum content of natural law," activities that are regulated in all societies because they are conditions of viable social existence, even though the precise content and manner of proscription and sanctioning is variable (Hart 1961, Chapter IX, Part II).

The recognition of labelling as a cause of crime was also not entirely new and had been anticipated even by some criminologists in the positivist tradition (most explicitly Wilkins 1964, whose concept of deviance amplification in turn influenced labelling theorists). While it is the case, as Lemert claims, that often "social control leads to deviance," it is disputable whether it is the "richer premise for studying deviance." Lemert's claim rests on the assumption that "secondary deviance," which follows labelling, is more pervasive and problematic than "primary deviance," which precedes it. But this is an empirical question that is likely to vary in different times and places, and with regard to different kinds of deviance and social reaction, not a "premise."

Any plausibility the imperialistic claims of labelling theory had derived from the limited nature in practice of their empirical research. These tended to concentrate on marginal or exotic forms of deviance, which lend themselves to being seen as harmful or problematic not intrinsically but primarily if not solely because of labelling: marijuana use, the bohemian subculture of jazz musicians (Becker 1963); "hustlers, beats and others" (Polsky 1967); and "crimes without victims" (Schur 1965). An early critique castigated this pithily as the "sociology of nuts, sluts and "preverts" (sic)" (Liazos 1972).

The labelling theory pioneers' focus on the dramatic and colorful made it much easier to ignore the harms done by some primary deviance. They concentrated on the creation of crime by the labelling activities of low-level control agents, reversing the moral assessments of criminal law and justice – as explicitly advocated by Becker in his call for criminologists to ask "Whose Side Are We On?" (1967). This not only neglected the harms done by some crime but bracketed out its structural causes and the structural determinants of control activity – law, culture, political economy, wider social patterns, and institutions (as Gouldner argued in his 1968 repost to Becker "The Sociologist As Partisan"). This critique stimulated the morphing of labelling theory into more politically radical forms of "new criminology" and "deviance theory" in the 1970s

(the core classics were Cohen 1971; Taylor et al. 1973; as well as the seminal studies discussed extensively in this paper, Young 1971; Cohen 1972; Hall et al. 1978).

Labelling theory has had a huge impact, fundamentally shifting the criminological paradigm away from a taken for granted correctionalist stance and stimulating a variety of forms of critical perspective. Much of its influence is now hidden, domesticated in the proliferating analyses of policing, media, and criminal justice. Although the sweeping claims of its originators are hard to sustain, its legacy lives on explicitly in contemporary cultural criminology and other qualitative and critical approaches.

Related Entries

- ▶ Labeling Theory
- ▶ New Media and Crime Images
- ▶ Use of Social Media in Policing

Recommended Reading and References

Altheide D (2009) Moral panic: from sociological concept to public discourse. Crime Media Cult Int J 5(1):79–99

Becker HS (1963) Outsiders: studies in the sociology of deviance. Free Press of Glencoe, London

Becker H (1967) Whose side are we on? Soc Probl 14(1):239–247

Cohen S (ed) (1971) Images of deviance. Penguin, London

Cohen S (1972) Folk devils and moral panics: the creation of the Mods and Rockers. MacGibbon and Kee, London

Cohen S (2011) Whose side were we on? The undeclared politics of moral panic theory. Crime Media Cult Int J 7(3):28–38

Durkheim E (1895/1964) The rules of sociological method. Free Press, Glencoe

Ericson RV, Baranek PM, Chan JBL (1991) Representing order: crime, law, and justice in the news media. University of Toronto Press, Toronto

Garland D (2008) On the concept of moral panic. Crime Media Cult Int J 4(1):9–30

Goode E, Ben-Yehuda N (2009) Moral panics: the social construction of deviance, 2nd edn. Wiley-Blackwell, Chichester/Malden

Gouldner A (1968) The sociologist as partisan: sociology and the welfare state. Am Sociol 3(2):103–116

Greer C, Mclaughlin E (2010) We predict a riot? public order policing, new media environments and the rise of the citizen journalist. Br J Criminol 50(6):1041–1059

Greer C, Mclaughlin E (2011) Trial by media: policing, the news 24–7 news mediasphere, and the politics of outrage. Theor Criminol 15(1):23–46

Greer C, Mclaughlin E (2012a) Media justice: Madeleine McCann, intermediatisation and' trial by media', in the British Press. Theor Criminol 16(4):395–416

Greer C, Mclaughlin E (2012b) 'This is not justice': Ian Tomlinson, Institutional Failure and the Press politics of outrage. Br J Criminol 52(2):274–293

Greer C, Reiner R (2012) Mediated mayhem: media, crime, criminal justice. In: Maguire M, Morgan R, Reiner R (eds) The Oxford handbook of criminology, 5th edn. Oxford University Press, Oxford

Hall J (1935/1952) Theft, law and society. Bobbs Merrill, Indianopolis

Hall S (2007) 'Moral panics: then and now' *moral panics: then and now*. Presentation at the British Academy, London, 9th March 2007 – available at: http://www.britac.ac.uk/audio.cfm/assetfileid/9513

Hall S, Critcher C, Jefferson T, Clarke J, Roberts B (1978) Policing the crisis: mugging, the state, and law and order. Macmillan, London

Hart H (1961) The concept of law. Oxford University Press, Oxford

Lacey N, Zedner L (2012) Legal constructions of crime. In: Maguire M, Morgan R, Reiner R (eds) The Oxford handbook of criminology, 5th edn. Oxford University Press, Oxford

Lemert E (1967) Human deviance. Prentice Hall, Englewood Cliffs

Liazos A (1972) The poverty of the sociology of deviance: nuts, sluts, and preverts. Soc Probl 20(1):103–120

Mathiesen T (1997) The viewer society: Michel Foucault's "panopticon" revisited. Theor Criminol ½:215–234

McLaughlin E (2008) Hitting the panic button: policing/'mugging'/media/crisis. Crime Media Cult Int J 4(1):145–154

McRobbie A, Thornton S (1995) Rethinking "moral panic" for multi-mediated social worlds. Br J Sociol 46(4):559–574

Merton R (1938/1957) Social structure and anomie. Am Sociol Rev 3:672–682

Polsky N (1967) Hustlers, beats and others. Penguin, London

Reiner R (2007) Law and order: an honest citizen's guide to crime and control. Polity, Cambridge

Schur E (1965) Crimes without victims. Prentice Hall, Englewood Cliffs

Schur E (1979) Interpreting deviance: a sociological introduction. Harper and Row, New York

Taylor I, Walton P, Young J (1973) The new criminology. Routledge, London

Thompson JB (2005) The new visibility. Theory Cult Soc 22(6):31–51

Young J (1971) The drugtakers: the social meaning of drug use. Paladin, London
Young J (1979) Left idealism, reformism and beyond: from the new criminology to Marxism. In: Bob F, Kinsey R, Lea J, Picciotto S, Young J (eds) Capitalism and the rule of law: from deviancy to Marxism. Hutchinson, London

Latent Class Growth Modeling

► Group-Based Trajectory Models

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Law Enforcement

► Drug Enforcement

Law of Community Policing and Public Order Policing

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Overview

It is likely impossible today to find a jurisdiction in the United States wherein a policing agency does not claim to practice community policing. Certainly the term is ubiquitous among law enforcement practitioners and scholars. The discussion around the practice for the last decade or so has not been whether to implement the approach but, rather, how exactly to implement it and the extent to which the practice is effective.

Less discussed is the relationship between law and community policing. By its very nature, community policing is focused upon patrol officers engaging in proactive conduct through exercise of discretion. Police discretion is, of course, framed and constrained by law – very typically constitutional law. However, unlike the constitutional rules that structure searches, seizures, and interrogations, the law pertaining to community policing and public order maintenance often is much more fluid. This entry will sketch out the fundamentals of that body of law as well as document current debates.

Fundamentals

There is a great deal of variation among the definitions of community and public order policing offered by scholars, but most agree that police engagement, collaboration, and partnership with private citizens are central features. An additional key feature of community policing emphasizes willingness on the part of individual police officers to proactively engage citizens to work on neighborhood problems and to promote community safety. While internal agency policy (essentially administrative rules) may regulate street-level policing in communities and neighborhoods, very few statutory rules govern these kinds of police practices. Constitutional law also seems mostly inapposite. Of course, the Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures, and the Fifth Amendment regulates police interrogation of citizens. Together with the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment,courts have developed a muscular, detailed, and complex body of law to govern important police practices. This jurisprudence, however, is focused primarily upon police investigation of crimes. State and federal courts have recognized, though, that a large portion of police responsibilities is not related to criminal investigation (Walker 1992)

and that traditional constitutional requirements may be inappropriate for regulating non-investigatory police activity.

Consider police searches as an example. Typically, to satisfy the Fourth Amendment, police must obtain a warrant from a magistrate certifying that they have probable cause to believe that the places, persons, and things to be searched are involved or related to a criminal act. Moreover, it is typically said that warrant requirement is extinguished only for certain categorical exceptions. But what happens when police engage in activities, such as responding to a leak in a private home that may damage property (*United States v. Boyd*, 407F. Supp. 693 (1976)), responding to a serious noise nuisance (*United States v. Rohrig*, 98F.3d 1506, 1522 (6th Cir. 1996)), responding to a missing person's claim (*State v. Brideswell*, 759 P.2d 1054 (Or. 1988); *Commonwealth v. Bates*, 548N.E. 2d 889 (1989)), retrieving a police-issued firearm from a private automobile (*Cady v. Dombrowski*, 413 U.S. 433 (1973)), investigating a potential burglary in progress (*United States v. Johnson*, 9F.3d 506 (6th Cir. 1993)), and assisting injured or endangered persons (*Wright v. State*, 7S.W.3d 148 (Tex. App. Ct. 1999)). In these and related situations, courts have not required police to first obtain a warrant from a judicial magistrate before entering homes and searching people. When discussing these activities, courts often point to the "Community Caretaking doctrine" (CC), in order to grant police relief from some of the traditional Fourth Amendment procedures. Courts typically apply CC where the police invade a traditional area of Fourth Amendment privacy but do so for purposes other than criminal investigation. Given the range of activities to which CC has been applied, there is a very real sense in which it can be considered the constitutional law of community policing.

Federal judge and legal scholar Debra Livingston has articulated two primary justifications for decreased procedural protections in CC cases (Livingston 1998). First, CC intrusions are thought not to impose stigma upon the victim because the police typically are not motivated by criminal suspicion when engaging in the intrusion. Second, many courts have concluded that community caretaking activities are less intrusive than investigative searches. During investigative searches, the police search all locations specified in the warrant in which the evidence may reasonably be found. The search continues until the police locate the relevant criminal evidence or determine it is not present. By contrast, when engaging in intrusions justified by CC, the police usually have no suspicion of criminal activity and thus have no reason to proactively search for criminal evidence.

Specifics of the Community Caretaking Doctrine

The courts are divided on the requirements imposed upon police officers when the CC doctrine applies. There are two primary camps.

One group of courts has interpreted CC as independent of traditional Fourth Amendment jurisprudence. On this view, CC intrusions are not governed by the usual probable cause and warrant requirements. Instead, a warrantless intrusion justified by the CC doctrine is permitted if the officer's actions were reasonable given the totality of the circumstances. For example, in *State v. Pinkard*, 319 Wis. 2d 234 (2010), a private citizen informed the police that two persons were sleeping in a home next to cocaine and other contraband and that the door to the home was open. The police entered the home to "make sure that the occupants . . . were not the victims of any type of crime[,] that they weren't injured . . . and to safeguard any life or property in the residence." Upon entering the home, the police seized drugs and other contraband in plain view. The Supreme Court of Wisconsin held that "the officers were engaged in a bona fide community caretaker function and that the community caretaker function was reasonably exercised under the totality of the circumstances." Similarly, in *Wright v. State*, 7S.W.3d 148, 151 (Tex. App. Ct. 1999), the court held that a "police officer may stop [a car to] assist an individual whom a reasonable person – given the totality of the circumstances – would believe is in need of help." This post hoc reasonableness test contrasts sharply with the traditional

categorical approach under the Fourth Amendment. It is not, however, a complete anomaly. The Supreme Court has, for example, applied reasonableness tests to a range of police functions that fall under the special needs exception, such as searches of student property (*New Jersey v. T.L.O.*, 469 U.S. 325 (1984)) and highway roadblocks (*Delaware v. Prouse*, 440 U.S. 648 (1979)).

A second group of courts, rather than interpreting CC as an independent doctrine with its own set of rules, have applied CC as an extension of the traditional exigent circumstances exception to the warrant requirement. The exigency exception extinguishes the warrant requirement when one or more categorically defined exigencies are satisfied (i.e., hot pursuit, destruction of evidence); and it is not practical for police to obtain a warrant. Importantly, under this line of reasoning, the police must still demonstrate probable cause. They are relieved only from the requirement of obtaining a warrant. Thus, some courts have held that the CC doctrine does not permit warrantless Fourth Amendment intrusions that lack probable cause (or reasonable suspicion when appropriate). Nor do such courts permit warrantless intrusions when police had sufficient time to obtain a warrant but did not. Courts have applied this interpretation of the CC doctrine in a number of circumstances including missing person cases (*State v. Brideswell*, 759 P.2d 1054 (Or. 1988); *Commonwealth v. Bates*, 548N.E. 2d 889 (Mass. 1990)) and responses to home burglary calls (*United States v. Erickson*, 991F.2d 529 (9th Cir. 1993)).

Judge Livingston has argued that the first interpretation of the CC doctrine is superior. She writes, CC "does not fit within the central assumptions [of traditional Fourth Amendment theory]. The 'reasonableness theory' ... can better and more sensitively accommodate those cases in which police officers have intruded on private places principally to serve legitimate community caretaking ends. Though the Court's 'special needs' cases have been subject to legitimate criticism, these cases in fact respond to the plausible intuition that some intrusions on privacy implicate a different set of social practices than traditional law enforcement and are sufficiently unlike law enforcement intrusions so as to justify a distinct Fourth Amendment approach. This same intuition, however, applies to police intrusions to protect life and property or to serve other important community caretaking purposes" (Livingston 1998 at 261, 265).

In addition to these two primary interpretations of the CC doctrine, some courts have conceptualized CC in terms of a third doctrine, the "emergency doctrine." Recently, the Supreme Court defined the standard for the emergency doctrine as follows: "police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threated with such injury"(*Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). John Decker discusses CC in relation to the emergency doctrine extensively (Decker 1999).

When Does the CC Doctrine Apply?

There are three key legal questions for courts to answer when determining whether the CC doctrine applies in a particular case. First, what kind of public interests and police objectives lay within the scope of CC? Second, what happens when CC objectives overlap with clear criminal investigative objectives? Third, does CC apply to private residences?

The Courts have provided some guidance on the first question and, by implication, the second. The United States Supreme Court in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973), concluded that the CC doctrine applies, at the very least, to cases in which the police objective was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Following this logic, lower courts have applied CC to a range of police activities, such as responding to a leak in a private home that may damage personal property (*United States v. Boyd*, 407F.Supp. 693 (1976)), responding to a serious noise nuisance (*United States v. Rohrig*, 98F.3d 1506, 1522 (6th Cir. 1996)), responding to a missing person's claim (*State v. Brideswell*, 759 P2d 1054 (Or. 1988)), retrieving a police-issued firearm

from a private automobile (*Cady v. Dombrowski*, 413 U.S. 433 (1973)), and assisting injured or endangered persons (*Wright v. State*, 7S.W.3d 148 (Tex. App. Ct. 1999)). Collectively, case law suggests that the CC doctrine applies to three main categories of police functions: protection of public or private property, protection of individual or community safety, and elimination of public nuisance. Each of these categories, of course, is an area ripe of potential for community policing activity.

Note that the *Dombrowski* Court equivocated on whether the CC doctrine applies when criminal investigative objectives also are present. The reality is that even when such objectives are not present at the outset of an engagement between citizens and police when police are acting in their community caretaking capacity, it is likely that at some point the encounter may take on a criminal investigative character. What to do in such situations? The answer requires resolving two sub-issues.

First, may an officer legally conduct a search under the CC doctrine when his true subjective intent is to investigate criminal activity? At least one court has held that the CC doctrine can apply even if the subjective purpose of the officer is investigative in nature stating that "a court may consider an officer's subjective intent in evaluating whether the officer was acting as a bona fide community caretaker; however, if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions" (*State v. Kramer*, 759N. W.2d 598 (Wisc. 2009)). In contrast, John Decker insists that an "officer's actions must be motivated by an intent to aid or protect, rather than to solve a crime" in order for the CC doctrine to apply (Decker 1999). Decker then makes an argument similar to the Supreme Court's reasoning in *Indianapolis v. Edmond*, 531 U.S. 32 (2000). There the Court invalidated a randomized checkpoint utilizing dog sniffs of cars to detect drugs because each sniff of a car was not motivated by individualized suspicion and therefore lacked probable cause.

The second sub-issue is this: given the almost inevitable presence of some criminal/investigative purpose in a CC case, how much is too much? Judge Livingston proposes that for the CC doctrine to apply, "a legitimate community caretaking purpose [must have] clearly predominated over any law enforcement purpose that was present." Moreover, the CC purpose must "constitute an independent and substantial justification for the intrusion" (Livingston 1998).

Finally, a live question among the courts is whether the CC doctrine applies to private residences. The Supreme Court has never provided specific guidance on this issue, although in a case concerning police use of without a warrant of a heat sensor outside of a home in an attempt to detect increased thermal energy resulting from growing marijuana plants indoors, the Court seemingly has indicated that warrantless searches of homes presumptively are invalid. The lower federal courts are divided on the issue. Three circuits permit the application of the CC doctrine to homes, and four circuits (3rd, 7th, 9th, 10th) do not (Marinos 2012). Commentator Mary Naumann concludes that many state courts are more lenient than the federal courts, and several allow police to argue, when a citizen objects to an intrusion, that their actions as public servants were reasonable in the context of a balancing test wherein an individual's interest in privacy or autonomy is balanced against the state's interest in having the police act as public servants (Naumann 1999).

While the police can perform valuable and useful service as community caretakers, the potential danger of sanctioning this activity without limits should be obvious. To the extent that one believes that the Fourth Amendment's individualized suspicion required provides broad and sturdy protection against invasions of individual rights, then one should be skeptical of a doctrine that not only relaxes the warrant requirement but does not necessarily require even probable cause alone to justify a police action (but see Harcourt and Meares 2011). Thus, there is a risk that the doctrine could be used as pretext for criminal

investigation, providing police with a loophole for getting around Fourth Amendment strictures.

Conclusion

In a world in which people increasingly believe that police can and should play a large role in producing public safety, there is an increasing likelihood that police will utilize their discretion to play a proactive rule with respect to the public as opposed to a reactive one. Community policing as a philosophy presupposes this kind of activity. However, the constitutional law that provides a framework for policing has largely assumed that police act in a reactive investigatory fashion activated by citizen complaints regarding crime. The Supreme Court's community caretaking jurisprudence illustrates the dilemmas that both law enforcers and private citizens face as they attempt to navigate the realities of public safety production in their neighborhoods against the backdrop of a constitutional law that has been for the last few decades very skeptical of police discretion. Continued interplay among the judicial, legislative, and executive branches and public activism at the local level will be necessary to work out the rules of engagement that are both protective of individual rights while allowing police enough flexibility to do the jobs as public agents that their principals expect them to do on their behalf.

Related Entries

- ▶ Causes of Police Legitimacy
- ▶ Communities and the Police
- ▶ Community Policing
- ▶ Defining Disorder
- ▶ Law of Police Seizures and the Exercise of Discretion
- ▶ Legal Control of the Police
- ▶ Order Maintenance Policing
- ▶ Police Discretion and Its Control
- ▶ Police Legitimacy and Police Encounters
- ▶ Problem-Oriented Policing
- ▶ Procedural Justice, Legitimacy, and Policing
- ▶ Role and Function of the Police
- ▶ Social Disorder and Physical Disorder at Places
- ▶ Theories on Policing and Communities

Recommended Reading and References

Decker J (1999) Emergency circumstances, police responses, and fourth amendment restrictions. J Crim Law Criminol 89:433

Harcourt B, Meares T (2011) Randomization and the fourth amendment. Univ Chic Law Rev 78:809

Livingston D (1998) Police, community caretaking, and the fourth amendment. University of Chicago Legal Forum, p 261

Marinos MP (2012) Breaking and entering or community caretaking? A solution to the overbroad expansion to the inventory search. Civ Rights Law J 22:249, 264, 270

Naumann ME (1999) The community caretaker doctrine: yet another fourth amendment exception. Am J Crim Law 26:325

Walker S (1992) The police in America: an introduction, 2nd edn. McGraw-Hill, NewYork

Law of Confessions

- ▶ Law of Police Interrogation

Law of Crime Concentrations at Places

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Overview

Crime is not distributed randomly across jurisdictions but instead clusters geographically. As Eck and Weisburd (1995, 12) note in their chapter on

theories of crime and place, "Crime events are not uniformly distributed, a fact known for over a century. At every level of aggregation, some geographic areas have less crime than others." This has been demonstrated historically at multiple levels of geography (Weisburd et al. 2009a), and it is a fact that is typically well recognized by even private citizens, who may characterize some locations or neighborhoods as "good" and others as "bad." What has received less empirical attention until recently, however, is the strong concentration of crime at particular small places across cities. Places in this "micro" context are specific locations within the larger social environments of communities and neighborhoods (Eck and Weisburd 1995). Recent studies point to the potential theoretical and practical benefits of focusing research on crime places. In particular there has been a consistent finding that crime is tightly concentrated at just a small number of micro places in a city. These places are typically referred to as crime hot spots (Sherman and Weisburd 1995). They represent small geographic areas with high levels of criminal activity (typically measured by crime incidents or emergency calls for service) relative to other places in the city. This microgeographic conception of place approaches the distribution of crime with much smaller units of analysis than the neighborhoods or communities that have traditionally been of interest to criminologists studying crime and place (Weisburd et al. 2009a).

In one of the pioneering studies in this area, for example, Sherman et al. (1989) found that only 3.5 % of the addresses in Minneapolis, Minnesota, produced 50 % of all calls to the police in a single year. Fifteen years later, in a retrospective longitudinal study in Seattle, Washington, Weisburd et al. (2004) reported that between 4 % and 5 % of street segments in the city accounted for 50 % of crime incidents for each year over 14 years. These findings suggest that a focus on "good" and "bad" neighborhoods misses an important part of the story (see Groff et al. 2010). The unit of interest in understanding the distribution of crime should be much smaller in scope. A very small proportion of places in a jurisdiction are typically responsible for a substantial percentage of citywide crime.

The findings of remarkable concentrations of crime at place raise a more general question about the phenomenon of crime in cities. Is there some general law that applies across cities that dictates the general concentration of crime? This is the question raised in a recent book by Weisburd et al. (2012) entitled *The Criminology of Place: Street Segments and Our Understanding of the Crime Problem*. Studying crime at street segments in Seattle, they found a remarkable stability of crime concentrations each year over a 16-year period. They argue that these data, as well as prior studies showing similar concentrations of crime for specific years in other cities (e.g., see Pierce et al. 1988; Sherman et al. 1989), suggest that crime concentrations at micro places are relatively constant with about 5 % of places producing about 50 % of crime in a city each year.

The idea of a "law" of crime rates is not a new one. Emile Durkheim raised this possibility more than a century ago. Durkheim suggested that crime was not indicative of pathology or illness in society but at certain levels was simply evidence of the normal functioning of communities (Durkheim 1893 [1964], 1895 [1964]). For Durkheim, the idea of a normal level of crime reinforced his theoretical position that crime helped to define and solidify norms in society. While Durkheim's proposition regarding a normal level of crime in society does not seem to fit recent experience and is seldom discussed by criminologists today, Weisburd et al. (2012) argue that there is indeed a "normal level of crime" in cities, but one that relates to the concentration of crime at place and not to the overall rate of crime. While the absolute levels of crime in cities vary year to year, the extent of crime concentrations remains similar. The idea of a "law of crime concentrations" will be discussed in more detail after first reviewing more thoroughly the empirical research suggesting that crime is highly concentrated at micro units of geography.

Empirical Examples of the Concentration of Crime

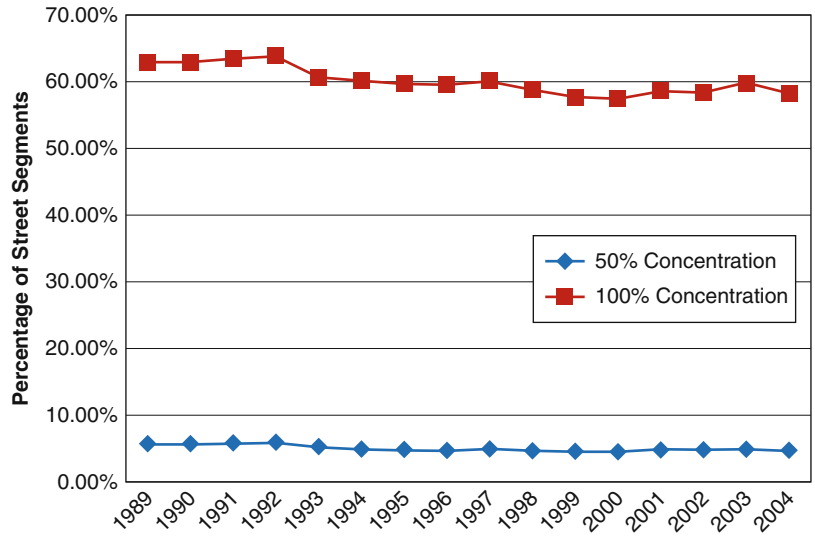
A number of studies over the past 20–30 years have found that a relatively small number of micro places are responsible for a significant proportion of total crime in a city. One of the most important early studies in this area was Sherman et al.'s (1989) analysis of emergency calls for service to addresses over a single year (December 1985–December 1986). Sherman et al. (1989) found that only 3.3 % of the addresses in Minneapolis produced just over 50 % of all calls to the police. If crime were randomly distributed across the 115,000 addresses in Minneapolis, one would not expect any places to have 15 or more calls in a single year. Instead, Sherman and colleagues (1989) found 3,841 such addresses, indicating that crime is far more concentrated than would be expected by chance. Pierce and colleagues (1988) found almost identical results when examining crime call concentrations in Boston, Massachusetts.

Weisburd et al. (1992) examined the distribution of crime in Minneapolis when aggregating address level data for a subsequent year (June 1987–June 1988) to crime hot spots of about one street block in length. Examining blocks with at least 20 hard crime (i.e., serious violent and property crime) calls for service, they found 365 hot spots in the city, which represented about 2.5 % of Minneapolis' street segments. These streets accounted for 27.3 % of all hard crime calls for service in the city. These streets also accounted for 27.8 % of soft crime (i.e., disorder) calls for service across the 1-year period. Overall then, whether examining individual addresses or clusters of high crime addresses, crime was highly concentrated at a small number of places.

More recently, Weisburd, Telep, and Lawton (in press) found high rates of concentration when examining crime incidents in New York City in 2009 and 2010. About 77 % of total incidents were geocoded to street segments. Approximately 52 % of the incidents on street segments were found in the top 5 % of street segments both years. Just under a quarter of crime incidents were found at 1 % of the street segments. Similar concentrations were found when examining incidents geocoded to intersections. About half of incidents at intersections were found at the top 5 % of the intersections, while slightly more than 20 % were found at the top 1 % of intersections. Between 55 % and 60 % of the street segments and intersections each year had no crime incidents.

Weisburd and Amran (forthcoming) found similarly high rates of the concentration of crime at place when examining crime incidents at street segments in 2010 in Tel Aviv-Jaffa, Israel. One quarter of all incidents were found at just 0.9 % of the street segments in the city, and 50 % of incidents were located at about 4.5 % of total street segments. About 60 % of street segments in the city did not experience any crime incidents in 2010. These findings suggest the broad application of the "law of concentrations" for crime at place. Even in a jurisdiction thousands of miles from the United States, similar levels of crime concentration were found.

Spelman (1995) offers some words of caution about the use of cross-sectional data in analyzing the concentration of crime at place (see Eck and Weisburd 1995). He examined calls for service at schools, public housing projects, subway stations, and parks and playgrounds longitudinally in Boston. He found evidence of a high degree of stability of crime at the "worst" of these places over a 3-year period. While the top 10 % of public places in terms of crime were responsible for about 30 % of calls for service (see also Eck et al. 2000), he notes that "Much of the concentration of crime among locations is due to random and temporary fluctuations that are beyond the power of the police and the public to control reliably" (Spelman 1995, 142). Thus, even though many of the highest crime places remained high crime, some of the change over time reflected random variation, suggesting the importance of longitudinal approaches to the study of crime at place. Despite these cautions, Spelman (1995) still advocated for efforts such as community problem-solving to address underlying problems at persistent high crime locations.



Law of Crime Concentrations at Places, Fig. 1 Crime incident concentrations in Seattle, Washington, 1989–2004

More recently, two studies in Seattle have examined the distribution of crime at street segments using a much longer time series. Weisburd et al. (2004) not only confirmed the concentration of crime but also the stability of such concentrations across a long time span. Weisburd et al. (2004) examined street segments in the city of Seattle from 1989 through 2002. They found that 50 % of crime incidents over the 14-year period occurred at between 4 % and 5 % of the street segments each year. This concentration was also very stable year to year.

Weisburd et al. (2012) updated and expanded these analyses, examining crime incidents at street segments in Seattle from 1989 to 2004. They again found that crime was highly concentrated and these concentrations remained fairly stable across the time period under study. They found that each year 50 % of crime incidents occurred on between 4.7 % and 6.1 % of street segments (see Fig. 1). All crime was found on around 60 % of street segments each year, suggesting that about 40 % of street segments recorded no crime each year in Seattle. The 247 highest crime street segments, about 1 % of the total in Seattle, were responsible for over 23 % of crime incidents across the 16-year period. Crime was even more heavily concentrated when examining a smaller proportion of citywide crime. For example, in the year 2000 in Seattle, just 11 street segments out of over 24,000 in total were responsible for 5 % of crime in the city, and only 31 streets produced over 10 % of the crime incidents.

These strong crime concentrations remain when focusing on specific types of offenders or crimes. For example, Weisburd et al. (2009b) examined the concentration of crime incidents in which a juvenile was arrested in Seattle. They found even stronger levels of concentration than for crime incidents more generally. Less than 1 % of street segments were responsible for 50 % of juvenile arrest incidents each year from 1989 to 2002. Only 86 street segments accounted for one third of all official juvenile arrest incidents over the 14-year period. As another example, Weisburd and Mazerolle (2000) examined the number of calls for service in 56 drug hot spots in Jersey City, New Jersey, that made up about 4.4 % of the street segments and intersection in the city. About half (47 %) of both narcotics arrests and calls for service were found in these hot spots, suggesting the strong concentration of drug activity in Jersey City.

In Boston, Braga et al. (2010) found that just 4.8 % of the street segments were the site of 73.9 % of all gun assaults over a 29-year period. Braga et al. (2011) also examined the concentration of robbery incidents at street segments and intersections in Boston from 1980 to 2008.

Each year, about 2 % of street units accounted for 50 % of the robbery incidents in the city. The top 52 street units, which represented just 0.18 % of total units in the city, were responsible for 10,886 of the 135,276 robberies (8.0 %) over the 29-year period. Commercial robberies are even more highly concentrated than street robberies. From 1980 to 2008, just 1.3 % of street segments were responsible for about half of commercial robberies. In Minneapolis, Sherman et al. (1989) found that the 54 addresses (about 0.047 % of the total addresses in the city) that had at least ten calls for service for public predatory crime (a combination of robbery, auto theft, and rape) were responsible for over 7.5 % of all such calls.

These trends for specific crime types are once again consistent when looking at data from outside the United States. Andreson and Malleson (2011) examined the distribution of calls for service for seven offense types in Vancouver, Canada, in 1991, 1996, and 2001. They found that for each crime type, 50 % of calls were found on between about 1 % and 8 % of street segments. Burglary showed the lowest level of concentration, although in 2001, for example, 50 % of burglary calls were on 7.61 % of street segments and only 39.43 % of streets had any burglary calls. Robbery was incredibly concentrated in Vancouver. In 2001, 50 % of robbery calls were found on just 0.84 % of street segments in the city, and only 5.32 % of streets had any robbery calls.

Sherman (1995) argues that such clustering of crime at places is even greater than the concentration of crime among individuals. Weisburd et al. (2004) found that 5 % of streets produced 50 % of crime throughout the 14-year study period. In Wolfgang et al.'s (1972) groundbreaking Philadelphia, Philadelphia birth cohort study, they found that 6 % of the cohort produced 50 % of the offenses committed by the cohort. While these statistics seem similar, 6 % of a city's population is likely to yield thousands of targets, while 5 % of street segments in a city like Seattle is only around 1,500 places. And those places are not "moving" targets for police since they stay in the same place. This suggests that focusing on places may be more efficient than focusing on people (Weisburd and Telep 2010). As Sherman (1995, 37), "Why aren't we thinking more about whereunit, rather than just whodunit?"

Importantly, Weisburd and colleagues (2012) also found that the micro place concentrations in Seattle were not just proxies for neighborhood-level effects (see also Groff et al. 2010). While they did find some evidence of larger area effects in their analyses and some clustering of high crime streets, particularly in the Central Business District, their overall conclusion was that there is a great deal of street-by-street heterogeneity in crime patterns. In other words, crime hot spots can be found throughout the city, and so there is a great deal of variability street-to-street within both "good" and "bad" neighborhoods.

A Law of Crime Concentrations

These findings about the concentration of crime are particularly interesting in light of Emile Durkheim's classic proposition that the level of crime is stable in society or rather that there was a "normal level" of crime in society. For Durkheim, this meant that crime was not necessarily an indication of an illness or pathology in society but rather that healthy societies would inevitably have some normal level of crime. Crime waves and crime drops in this context can be seen as the result of some "abnormality" in a society that results from crisis or dramatic social change.

Underlying Durkheim's proposition was his understanding of crime as a product of social definition. Kai Erickson (1966) was to build upon this idea in his classic study *Wayward Puritans*, where he sought to show that the definition of crime had a social function. By defining others as deviant, society can help draw the boundaries between acceptable and unacceptable conduct (see also Adler and Adler 2009). Defining people as criminal in this sense serves a function in defining the moral boundaries of society. One can know the boundaries of acceptable behavior by observing "deviants" who are sanctioned for violating societal norms.

Crime rates over the last few decades would seem to strongly contradict Durkheim's

conception of normal levels of crime in society. Between 1973 and 1990, violent crime doubled, and then in the 1990s, the USA experienced a well-documented "crime drop" (Blumstein and Wallman 2000). In the 1970s, Blumstein and Cohen (1973) hypothesized that Durkheim's proposition could be applied to punishment in America, where imprisonment rates had remained static for a long period of time. But recent dramatic increases in the US incarceration rate in the 1980s and 1990s would seem inconsistent with the normal crime or "normal punishment" (Blumstein and Cohen 1973) hypothesis.

Weisburd et al. (2012), however, take a different approach to Durkheim's theory and instead argue that there is indeed a "normal" level of crime in cities, but one that relates to the concentration of crime at place and not to the overall rate of crime. They claim that a different proposition from Durkheim's can be raised at this juncture and should be examined in future studies. There appears to be a "law of concentrations" of crime at place. The consistency of crime concentrations at micro places over time and across geographic locations as diverse as Minneapolis, Minnesota, and Tel Aviv-Jaffa, Israel, suggests that there is some underlying social process pushing crime to certain levels of concentration in modern cities.

What might lead to this stability? It is important to note at the outset that the concentration of crime follows patterns of concentration in many other areas of scientific inquiry (e.g., see Eck et al. 2007; Koch 1999; Sherman 2007). Joseph Moses Juran (1951) first noted this concentration in looking at economic activities, coining the phrase "the vital few and the trivial many." Juran sought to emphasize to managers that they should focus on the small number of events or cases that produce the majority of relevant business activities, for example, the small number of defects that cause most complaints about products or the small number of clients that are responsible for a majority of revenue. Juran termed this phenomenon the "Pareto Principal" after Vilfredo Pareto (1909), who first brought attention to what is sometimes referred to as the 80-20 rule (see Koch 1999). Pareto observed that a number of distributions seem to follow this specific pattern of concentration. For example, in studying land ownership in Italy, he found that 80 % of the land was controlled by just 20 % of the population. He also observed that 20 % of the pea pods in his garden produced 80 % of the peas. The 80-20 rule is generally seen only as an approximation, but it applies fairly well to Weisburd et al.'s (2012) data in Seattle. Eighty percent of the crime incidents each year were found on between 19 % and 23 % of the street segments. Of course, the question remains, what leads to the tremendous concentration and stability of crime at microgeographic places over time?

In their discussion of the concentration of crime at facilities, Eck and colleagues (2007) discuss how crime follows the J-curve pattern found in a number of other phenomena. As they describe, "To reveal a J-curve, the number of crimes in a given time period at each facility needs to be known, and then the facilities ranked from those with the most crimes to those with the fewest. If a bar chart of the crime frequency is drawn, a few facilities at the left end of this distribution will have many crimes, but as one moves to the right there will be a steep drop-off in crimes that flattens out at a very few or no crimes for the majority of the facilities. The resulting graph resembles a reclining J" (Eck et al. 2007, 228). The words "micro place" can easily be substituted for "facilities."

They point to five potential reasons why crime might be concentrated at particular facilities, which are relevant to consider when understanding the concentration of crime at micro places. The first was noted above; some portion of the concentration can be explained by random variation. That is, some hot spots of crime would likely cool off without any intervention. Random variation, however, is not the whole story, as Weisburd et al. (2012) demonstrated by showing that the hottest street segments in Seattle remained high crime throughout the 16-year study period. A second explanation is changes in reporting processes. If the police changed their crime incident reporting protocols, for example, this could have some impact on the

level and concentration of crime, although again this does not explain the stability of concentration in Seattle, which experienced no major change in reporting patterns from 1989 to 2004.

The last three potential explanations focus on the characteristics of particular facilities (or places). Eck and colleagues (2007) point to offenders, targets, and place management as potential reasons why some facilities may be riskier than others. Some places may be crime attractors if they tempt potential offenders with rampant opportunities for criminal activity. Places can also be rich in targets and be crime generators. Finally, poor place management (i.e., a lack of supervision and guardianship) can be a crime enabler. Examining the characteristics of places was the focus of Weisburd et al.'s (2012) research in Seattle, and they demonstrated that crime opportunity factors play a key role in explaining the concentration of crime in hot spots. These factors are important for understanding why some places become hot spots, but they do not necessarily explain why such a small number of hot spots are responsible for such a high percentage of crime citywide.

Can Durkheim's initial insights also be used to consider possible reasons for this law of concentrations of crime at place? Following Durkheim and other theorists that built on his work, one would look to the role of crime at place in defining normative boundaries in society. In this case, it could be argued that a certain number of places in the city with severe crime problems serve as lessons for the city more generally. This would fit well with the finding by Weisburd et al. (2012) that crime hot spots are found throughout the city. Accordingly, everyone would have direct visceral experiences with the "bad places" in the city, and perhaps that serves to define the "moral boundaries" of place for individuals. The normal level of crime concentrations in this context would relate to the proportion of problem places that are needed to bring the lessons of moral boundaries to the city's residents.

Another possible explanation for a law of concentrations comes from the concentration of other characteristics of places in the city. For example, Weisburd et al. (2012) note that the concentration of bus stops or number of public facilities, like crime, stays relatively stable over long periods. Perhaps the law of concentrations of crime is related to the overall distribution of social and environmental characteristics of places in cities. Does the stability of patterns of business and employment in a city, for example, reflect more general patterns of concentration that are related to the growth and development of urban areas? Cities regulate such concentrations, by defining commercial, business, and industrial use of property. Perhaps the normal concentrations of crime are simply a reflection of the normal concentrations of other social activities in the city. The law of concentrations of crime at place may simply be a reflection of a more general law of the stability of concentrations of specific aspects of social and economic life in the city, as discussed above with Juran's (1951) notion of the Pareto Principle.

But this brings the discussion back to Durkheim, because crime is a social phenomenon and its tolerance is a social construct. Is society willing to tolerate crime at only a certain proportion of the landscape of a city? Is the law of concentrations a result of the boundaries of crime at place that citizens are willing to tolerate? Will people become worried and call for action when crime hot spots increase beyond a specific proportion of places in the city, and will they become more lax when the concentrations are below that level? Certainly, this law of concentrations needs to be studied across other metropolitan centers around the world to see how widely it applies. More generally, it is time for scholars to explore more directly the explanation for the law of concentrations of crime trends at micro places. In the spatial context, scholars should explore both social and environmental characteristics of street segments that are important to understanding the concentration of crime at place.

Related Entries

- ▶ Criminology of Place
- ▶ Geography of Crime and Disorder
- ▶ History of Geographic Criminology Part I: Nineteenth Century

- History of Geographic Criminology Part II: Twentieth Century
- Hot Spots and Place-Based Policing
- Longitudinal Crime Trends at Places

Recommended Reading and References

Adler PA, Adler P (2009) Constructions of deviance: social power, context, and interaction, 6th edn. Wadsworth Publishing, Belmont

Andreson MA, Malleson N (2011) Testing the stability of crime patterns: implications for theory and practice. J Res Crime Delinq 48:58–82

Blumstein A, Cohen J (1973) A theory of the stability of punishment. J Crim Law Criminol 64:198–207

Blumstein A, Wallman J (eds) (2000) The crime drop in America. Cambridge University Press, Cambridge

Braga AA, Hureau DM, Papachristos AV (2011) The relevance of micro places to citywide robbery trends: a longitudinal analysis of robbery incidents at street corners and block faces in Boston. J Res Crime Delinq 48:7–32

Braga AA, Papachristos AV, Hureau DM (2010) The concentration and stability of gun violence at micro places in Boston, 1980–2008. J Quant Criminol 26:33–53

Durkheim E (1893 [1964]) The division of labour in society. Free Press, New York

Durkheim E (1895 [1964]) The rules of sociological method. In: Catlin GEG (ed) Translated by Solovay SA, Mueller JH. Free Press, New York

Eck JE, Clarke RV, Guerette RT (2007) Risky facilities: crime concentration in homogenous sets of establishments and facilities. In: Farrell G, Bowers KJ, Johnson SD, Townsley M (eds) Imagination in crime prevention. Crime prevention studies, vol 21. Criminal Justice Press, Monsey, pp 225–264

Eck JE, Gersh JS, Taylor C (2000) Finding crime hot spots through repeat address mapping. In: Goldsmith V, McGuire PG, Mollenkopf JH, Ross TA (eds) Analyzing crime patterns: frontiers of practice. Sage, Thousand Oaks, pp 49–64

Eck JE, Weisburd D (1995) Crime places in crime theory. In: Eck JE, Weisburd D (eds) Crime and place, crime prevention studies, vol 4. Willow Tree Press, Monsey, pp 1–33

Erikson KT (1966) Wayward puritans: a study in the sociology of deviance. Wiley, New York

Groff ER, Weisburd D, Yang S-M (2010) Is it important to examine crime trends at a local "micro" level?: a longitudinal analysis of street to street variability in crime trajectories. J Quant Criminol 26:7–32

Juran JM (1951) Quality control handbook. McGraw-Hill, New York

Koch R (1999) The 80/20 principle: the secret of achieving more with less. Nicholas Brealey Publishing, Naperville

Pareto V (1909) Manuel d'économie politique. Vol. 7 of oeuvres complètes. Droz, Geneva

Pierce G, Spaar S, Briggs LR (1988) The character of police work: strategic and tactical implications. Center for Applied Social Research, Northeastern University, Boston

Sherman LW, Gartin P, Buerger ME (1989) Hot spots of predatory crime: routine activities and the criminology of place. Criminology 27:27–55

Sherman LW (1995) Hot spots of crime and criminal careers of places. In: Eck J, Weisburd D (eds) Crime and place. Crime prevention studies, vol 4. Willow Tree Press, Monsey, pp 35–52

Sherman LW (2007) The power few: experimental criminology and the reduction of harm. J Exp Criminol 3:299–321

Sherman LW, Weisburd D (1995) General deterrent effects of police patrol in crime 'hot spots': a randomized, controlled trial. Justice Q 12:625–648

Spelman W (1995) Criminal careers of public places. In: Eck JE, Weisburd D (eds) Crime and place, crime prevention studies, vol 4. Willow Tree Press, Monsey, pp 115–143

Weisburd D, Amram S (forthcoming) The law of crime concentrations at places: the case of Tel Aviv. Police Pract Res Int J

Weisburd D, Bruinsma GJN, Bernasco W (2009a) Units of analysis in geographic criminology: historical development, critical issues, and open questions. In: Weisburd D, Bernasco W, Bruinsma GJN (eds) Putting crime in its place: units of analysis in geographic criminology. Springer, New York, pp 3–31

Weisburd D, Bushway S, Lum C, Yang S-M (2004) Trajectories of crime at places: a longitudinal study of street segments in the city of Seattle. Criminology 42:283–321

Weisburd D, Groff ER, Yang S-M (2012) The criminology of place: street segments and our understanding of the crime problem. Oxford University Press, New York

Weisburd D, Maher L, Sherman L (1992) Contrasting crime general and crime specific theory: the case of hot spots of crime. In: Adler F, Laufer W (eds) New directions in criminological theory, advances in criminological theory, vol 4. Transaction Press, New Brunswick, pp 45–69

Weisburd D, Morris NA, Groff ER (2009b) Hot spots of juvenile crime: a longitudinal study of street segments in Seattle, Washington. J Quant Criminol 25:443–467

Weisburd D, Mazerolle LG (2000) Crime and disorder in drug hot spots: implications for theory and practice in policing. Police Q 3:331–349

Weisburd D, Telep CW, Lawton BA (in press) Could innovations in policing have contributed to the New York City crime drop even in a period of declining police strength?: the case of stop, question and frisk as a hot spots policing strategy. Justice Quarterly

Weisburd D, Telep CW (2010) The efficiency of place-based policing. J Police Stud 17:247–262

Wolfgang ME, Figlio RM, Sellin T (1972) Delinquency in a birth cohort. University of Chicago Press, Chicago

Law of Police Interrogation

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Synonyms

Law of confessions; Police interrogation

Overview

The law of interrogation in the United States is largely a product of United States Supreme Court cases interpreting the United States Constitution. Three parts of the Constitution regulate interrogation practices. The most obvious regulation is found in the Fifth Amendment right not to be compelled to incriminate oneself. The United States Supreme Court also found in the Due Process Clause of the Fifth and Fourteenth Amendments a right not to be coerced into confessing. The Court read the Sixth Amendment right to the assistance of counsel to offer protection against interrogation in some circumstances. Each of these rights provides a slightly different protection, but together they seek to ensure that a suspect makes an uncoerced decision about whether to confess and has the assistance of a lawyer when desired.

Due Process Requirement that Confessions Be Voluntary

The Court's due process analysis initially drew heavily on the English common law. As far back as the late seventeenth century, English judges were skeptical of confessions that were influenced by threats or promises of favor. By 1788, the leading technical treatise of English law reported that the law of confessions refused to admit statements obtained "by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted . . . for the law will not suffer a prisoner to be made the deluded instrument of his own conviction" (Hawkins 1788). Confessions taken under those conditions were later referred to as "involuntary."

The core notion of "involuntary" follows the English common law, with "flattery of hope" understood as promises of benefit and "impressions of fear" understood to be threats. In the infamous case of *Brown v. Mississippi*, 1936, for example, the United States Supreme Court held that the Fourteenth Amendment Due Process Clause forbids the use of confessions that are produced by brutal beatings and threats that the torture would continue. The Court held in several cases that threats made the confessions involuntary even where there was no torture. In *Payne v. Arkansas*, 1958, the chief of police said that he would probably be able to protect the suspect from the mob outside if he told the truth about what happened. In *Lynum v. Illinois*, 1963, the police told the suspect that she would lose custody of her children if she did not "cooperate" with them. In *Arizona v. Fulminante*, 1991, a government informant promised to protect the suspect from violent reprisals from other prisoners but only if the suspect told the truth about raping and murdering his stepdaughter.

The Supreme Court also applied the term "involuntary" to confessions that did not include classic examples of threats or promises of benefits. One way to describe the Court's involuntariness doctrine as it evolved is that it serves "a complex of values . . .; which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case" *Blackburn v. Alabama*, 1961. In its more than 40 involuntary confessions cases, the Court has expressed concern about unreliable confessions, about protecting the will of the suspect, and about morally offensive police conduct.

For example, *Ashcraft v. Tennessee*, 1944, held that 36 h of nonstop questioning made the defendant's confession involuntary, even though police made no threats or promises, because the questioning deprived him of the "mental

freedom" to decide whether to answer. *Townsend v. Sain*, 1963, reached the same result under a mental freedom theory when the police gave the suspect a drug that functioned as a form of truth serum. In *Spano v. New York*, 1959, a combination of factors rendered the confession involuntary. First, the suspect was "emotionally unstable and maladjusted." Police also repeatedly refused his requests for counsel and told him, falsely, that if he did not confess, his police officer friend might lose his job. The Court held that this combination of factors made the suspect's confession involuntary, in part because the police conduct was itself outside the law and thus morally offensive. In *Malinski v. New York*, 1945, the police strip-searched the suspect, gave him a blanket, and interrogated him while he was naked in an effort, the prosecutor said, "to humiliate him." The Court held the confession involuntary even though the interrogation was relatively brief.

Cases involving threats and promises of favor have traditionally raised issues about the reliability of the confession. Brutal torture, such as was used in *Brown v. Mississippi*, 1936, is as likely to produce a false confession as a true one. But in 1986, the Court held that the unreliability of a confession, standing alone, is not relevant to whether the Due Process Clause has been violated. *Colorado v. Connelly*, 1986, held that as long as the confession is not coerced or compelled by state actors, its reliability is completely a matter of state law. DNA evidence has recently made plain that police methods well short of torture can produce false confessions that are used to convict innocent defendants. These DNA exonerations have caused courts to focus on police deception and trickery – for example, lies about evidence – used to obtain confessions. The underlying notion is that if the police make the case against the innocent suspect look hopeless, he might falsely confess to some lesser involvement to escape the most severe punishment.

Police have long relied on deception during interrogation; in the famous case of *Miranda v. Arizona*, 1966, the Court noted a police strategy in which someone pretending to be an eyewitness would pick the suspect out of a lineup. Other deceptive techniques include fake lie detector results, fake tests that "prove" the suspect had recently fired a gun, lying about the suspect's fingerprints being at the scene of the crime, and lying about the existence of eyewitnesses. The issue that courts must address in deception cases is whether police techniques, either alone or in conjunction with other high-pressure interrogation strategies, render a subsequent confession involuntary. This might be true because the technique overbore the suspect's will, was a morally offensive police technique, or created too high a risk that an innocent suspect might confess falsely. American courts have generally permitted the use of confessions obtained by deception, while sometimes condemning the police conduct, on the ground that an innocent suspect would know that the evidence was false and could resist the temptation to confess.

But there are limits beyond which police may not go. A New Jersey Court held that it violated due process to play an audiotape of a fake eyewitness who claimed to have seen the shooting and identified the suspect as the shooter (*State v. Patton*, N.J. Superior Court, Appellate Division 2003). In *Cayward v. Florida*, Florida District Court of Appeal, 1989, the police showed the suspect two official reports that "proved" that his semen was found on the rape/murder victim. "One false report was prepared on stationery of the Florida Department of Criminal Law Enforcement; another was prepared on stationery of Life Codes, Inc., a testing organization." The Florida Court held that the use of manufactured documents crossed the line between permissible and impermissible deception.

As the cases discussed to this point suggest, the voluntariness test was difficult to apply. There are many factors to consider. More fundamentally, the inquiry itself is hopelessly indeterminate. Absent the kind of torture in *Brown* or overt threats of severe harm, it is not obvious whether a suspect answers police questions because it is his will to answer or because the police have overcome his volition. These difficulties led the

Supreme Court, and all the state courts of appeal, to review many state court decisions, each with unique facts.

When 1966 dawned, the Court realized that it needed a confession rule that made the volition inquiry easier and thus could be applied more mechanically than the voluntariness test.

Miranda v. Arizona's Requirement of Free Choice

In *Miranda*, 1966, the Court turned to the Fifth Amendment right not to be compelled to be a witness against oneself, often called the privilege against compelled self-incrimination. While freedom from compulsion seems roughly the same as freedom from forces that produce involuntary confessions, the five-justice majority in *Miranda* read the privilege to guarantee that suspects who answer police questions have to make a "free choice." Noting that little is known about what actually goes on in police interrogation rooms, the Court drew from textbook examples of police interrogation strategies, such as lying about the evidence against the suspect and discouraging him from remaining silent or asking for a lawyer. The Court sketched the history of the privilege against compelled self-incrimination, emphasizing its role in protecting the mental freedom to decide whether to cooperate with the State when it is seeking evidence of crime. From all of this, the Court concluded that the atmosphere of custodial police interrogation was inherently compelling. Thus, the Court held that *all statements* made in response to custodial police interrogation are compelled unless steps are taken to ameliorate the compulsion of the interrogation. Otherwise, the suspect could not make a "free choice" whether to answer police questions.

Though the Court left the door open for the states and Congress to come up with another way to ameliorate the inherent compulsion of police interrogation, it held that in the absence of an equally effective remedy, the Constitution required the famous *Miranda* warnings. Suspects must be told that that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to counsel, and that if they cannot afford counsel, a lawyer will be appointed at no cost to them. If a suspect answers questions after being told that he has these rights, answering might be his free choice. If so, the voluntariness question would, in a sense, answer itself in a *Miranda* world.

Most observers thought that *Miranda* would reduce the incidence of incriminating statements, perhaps drastically. While innocent suspects have an incentive to answer questions and explain why the police have arrested the wrong person, a guilty suspect's most rational course of action is to exercise the right to silence and to counsel. In the immediate wake of *Miranda*, some police officials, including the police chief of Los Angeles, accused the Court of trying to "end the use of confessions in convicting criminals" (Baker 1983).

Though the precise effect of *Miranda* on the confession rate is yet unknown, there is widespread agreement that at least 80 % of suspects waive their *Miranda* rights and consent to answer police questions, very often incriminating themselves. Although the *Miranda* Court said that the State had a "heavy burden" to prove the voluntariness of a *Miranda* waiver, later cases held that these waivers may be implied (from the actions or the words of the suspect) rather than explicit (*North Carolina v. Butler* 1979). Moreover, the Court recently held that "a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police" (*Berghuis v. Thomkins* 2010). When suspects waive *Miranda* (whether implicitly or explicitly), its protections typically play no role in mitigating the process or outcome of the subsequent interrogation. In almost all cases, the only protection available after *Miranda* has been waived is the protection against involuntary confessions, the very protection that *Miranda* was designed to supplement. Once waived, *Miranda* neither regulates nor restricts psychologically manipulative or deceptive

interrogation techniques, hostile or overbearing questioning styles, lengthy interrogation and confinement, or any of the many stressful conditions of modern accusatorial police interrogation. The leading police interrogation manuals continue to encourage some of the very same deceptive practices that were condemned in the *Miranda* opinion.

It seems likely that suspects who waive *Miranda* are responding to police pressure but that they also, at some level, may *want* to talk to police, to tell their side of the story, and to persuade the police that they should be released from custody. David Simon observed the Baltimore Homicide Department for a year. He concluded that every suspect who faces interrogation imagines a "small open window" that is "the escape hatch, the Out" (Simon 1991). Every suspect who "opens his mouth during an interrogation ... envisions himself parrying questions with the right combination of alibi and excuse" and then "crawling out the window to go home and sleep in his own bed." Thus, it seems that suspects waive their *Miranda* rights at least in part because they often *want to talk to police*. In most cases, of course, talking to police is a supremely irrational act. As David Simon imagines a detective's reflections: "[E]ven after all these years working homicides, there is still a small part of him that finds it completely mystifying that anyone utters a single word in a police interrogation." After all, "what do homicide detectives do for a living? Yeah, you got it, bunk. And what did you do tonight? You murdered someone."

However irrational it is for guilty suspects to talk to police, waiver is surprisingly easy to obtain. Police can also avoid *Miranda* protections because they do not apply to a substantial amount of police questioning. The warnings are required only when police engage in custodial interrogation, and police are free to engage in persistent, marathon questioning – for hours on end with no warnings – as long as they do not take the suspect into custody. Police often tell the suspect that he is not under arrest, to create a noncustodial situation, and then suggest that it is in his best interests to cooperate with them. Any reluctance to answer questions can be met with reassurances that he is not under arrest and that police just want to get his side of the story. Technically, the suspect is not in custody in this situation, and police interrogation without warnings is completely legal. In 1977, Justice Marshall urged the Court to expand *Miranda* to include coercive interrogations where technical custody was absent, arguing that while *Miranda* was initially limited to custodial interrogation, the "rationale of *Miranda* ... is not so easily cabined" (*Oregon v. Mathiason* 1977, Marshall, J., dissenting). But by 1977, the Court had settled on a course intended to keep *Miranda* from interfering with what it viewed as legitimate police interrogation.

In addition to the ease of proving waiver and the limitation of *Miranda* to custodial interrogation, four doctrines now permit the State to benefit from evidence learned from a violation of *Miranda*. The Court first created a "public safety" exception that permits police to question without warnings if the officer reasonably believes it is necessary to protect the public safety (*New York v. Quarles* 1984). There, police arrested a suspect in a supermarket; they expected him to be armed but his shoulder holster was empty. One officer asked where the gun was, and the Court allowed the State to use his answer on the ground that the officer had an obligation to find the gun and protect the public. A later doctrine that ignores police failure to comply with *Miranda* is that physical evidence found as a result of a *Miranda* violation can be introduced into evidence (*United States v. Patane* 2004). Thus, in the supermarket case, the State could have used the gun itself as evidence even without a public safety exception.

Evidence is also admissible despite a violation of *Miranda* when police succeed in remedying the violation. In most cases, police are permitted to remedy a failure to warn by providing warnings later even if the suspect has already made an incriminating statement. Thus, if the suspect makes an incriminating admission in his parents' home without warnings and it turns out that this is a violation of *Miranda*, giving warnings later at the police station will permit a second confession

to be admissible (*Oregon v. Elstad* 1985). *Elstad* would not apply, however, if the police had intentionally withheld warnings in the hope that the suspect would confess and then repeat the confession after the warnings are given (*Missouri v. Seibert* 2004).

A fourth area where statements taken in violation of *Miranda* can still be used is in impeaching the credibility of a defendant who testifies (*Harris v. New York* 1971). For example, if a defendant testifies that he has never sold narcotics, his statement to police admitting a sale can be introduced to suggest that he is not testifying truthfully, even though the statement was taken in violation of *Miranda*. The jury will be instructed not to consider the statement as evidence of guilt but only as to the defendant's credibility. Conventional wisdom is that juries would have a difficult time ignoring an admission of criminal behavior on the issue of guilt. At least a few police departments have advised officers to be willing to violate *Miranda* because the statements will always be available to impeach the defendant's testimony, a threat that seems likely to deter defendants from testifying.

In sum, the kind of robust guarantee of a "free choice" to decide whether to answer police questions probably intended by *Miranda* does not seem to exist. The most frequent loss of *Miranda* protections is through waiver, which leaves suspects facing police interrogators with nothing to protect them from zealous interrogation beyond the vague due process prohibition of involuntary statements. Moreover, in a *Miranda* world, the suspect's agreement to talk to police in effect creates a kind of soft presumption that statements made later in the interrogation must be voluntary. The choice to talk to police was, superficially at least, a free choice. And the suspect was told that he did not have to answer questions. Thus, answering questions an hour, or 2, or 30 h, later seems to be clothed in voluntariness. As Justice Souter noted in 2004: "[G]iving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver" (*Missouri v. Seibert* 2004 (plurality)).

Moreover, there is no right to warnings when the intense questioning takes place in a noncustodial situation. And, finally, even if *Miranda* is violated, four doctrines permit the State to use statements and physical evidence in any event.

Right to Counsel

Two years prior to *Miranda*, the Court held in *Massiah v. United States* (1964) that *indicted* defendants have a Sixth Amendment right to counsel when government actors are seeking to elicit incriminating statements. Thus, the government violated Massiah's Sixth Amendment rights when it used an informant to elicit statements from him after he was indicted. Massiah did not know that he was speaking to a government informant and thus there was no issue of waiver of the right to counsel. Waiver first arose in *Brewer v. Williams* (1978). The Court acknowledged that indicted defendants could waive their *Massiah* right to counsel but, on the facts of *Brewer*, the Court held that the state had failed to prove waiver.

The Court did not address how to prove waiver of the *Massiah* right to counsel until 1988. In *Patterson v. Illinois* (1988), the Court held that when an indicted defendant waived his *Miranda* right to counsel, he had simultaneously waived his *Massiah* right to counsel. This followed, the Court held, even though the two rights have different textual homes – *Massiah* the Sixth Amendment and *Miranda* the Fifth Amendment self-incrimination clause – and even though indictment is the beginning of the adversary criminal process. Like *Miranda*, the vote was 5-4. The dissent argued that the Sixth Amendment right to counsel carries with it duties and responsibilities that go beyond advice about answering questions, but the majority said that the issue was the usefulness of a lawyer in the particular proceeding. In the

context of interrogation, *Miranda* provides the measure of the usefulness of a lawyer.

One issue left undecided by *Patterson* was whether it matters if a judge has appointed a lawyer during a pretrial, and post-indictment, proceeding before police seek a *Miranda* waiver. Would a waiver of *Miranda* also waive *Massiah* when the indicted defendant is actually represented by counsel? Continuing a string of 5-4 decisions, the Court in *Montejo v. Louisiana* (2009) held that *Miranda* continues to provide the measure of a usefulness of a lawyer even if the defendant is formally represented by counsel. Thus, a waiver of *Miranda* is a waiver of *Massiah* whether or not the indicted defendant is represented by counsel.

In sum, *Massiah* provides indicted defendants with a right not to have incriminating statements elicited surreptitiously – the actual facts of the *Massiah* case – but it is not clear that the *Massiah* right to counsel adds anything to the *Miranda* right to counsel when police seek to interrogate indicted defendants.

Conclusion

The law of custodial police interrogation in 2012 begins with *Miranda*. Suspects who have been indicted also have a *Massiah* Sixth Amendment right to counsel. But as most suspects waive *Miranda*, and thus also waive *Massiah*, the real story continues to be the voluntariness test that has been evolving in Anglo-American law since the late seventeenth century. Nonetheless, *Miranda* continues to exert an enormous influence on the law of interrogation. Unlike the vague, subjective, and indeterminate due process test, *Miranda* provides police interrogators an easily administered procedure that is clear and whose outcomes are predictable. Its clarity and predictability are of great benefit to prosecutors and judges. In addition, *Miranda* has contributed to a civilizing of police behavior generally and to the professionalism of the interrogation process. It also serves symbolic and educational functions. It has increased popular awareness of the right not to answer police questions and of the right to counsel, so much so that the Rehnquist Court in 2000 concluded that *Miranda* has "become embedded in routine police practice to the point where the warnings have become part of our national culture" (*Dickerson v. United States* 2000).

Related Entries

- ▶ Criminal Defense Profession
- ▶ False Confessions and Police Interrogation
- ▶ FBI Influence on State and Local Police
- ▶ History of Criminal Investigation
- ▶ Legal Control of the Police
- ▶ Police Lying and Deception
- ▶ Sex Offenders and Criminal Policy

Recommended Reading and References

Arizona v. Fulminante, 499 U.S. 279 (1991)
Ashcraft v. Tennessee, 322 U.S. 143 (1944)
Baker L (1983) Miranda: crime, law and politics. Atheneum, New York
Berghuis v. Thompkins, 130 S.Ct. 2250 (2010)
Blackburn v. Alabama, 361 U.S. 199 (1961)
Brewer v. Williams, 430 U.S. 387 (1978)
Brown v. Mississippi, 297 U.S. 278 (1936)
Colorado v. Connelly, 479 U.S. 157 (1986)
Dickerson v. United States, 530 U.S. 428 (2000)
Florida v. Cayward, 552 So.2d 971(Fla. Dist. App. Ct. 1989)
Harris v. New York, 401 U.S. 422 (1971)
Hawkins W (1788) A treatise of the pleas of the crown; or, a system of principal matters relating to that subject, digested under proper heads, 6th edn. Eliz. Lynch, Dublin: London
Lynum v. Illinois, 372 U.S. 528 (1963)
Malinski v. New York, 324 U.S. 401 (1945)
Massiah v. New York, 377 U.S. 201 (1964)
Miranda v. Arizona, 384 U.S. 436 (1966)
Missouri v. Seibert, 542 U.S. 600 (2004)
Montejo v. Louisiana, 129 S. Ct. 20179 (2009)
New York v. Quarles, 467 U.S. 649 (1984)
North Carolina v. Butler, 441 U.S. 369 (1979)
Oregon v. Elstad, 470 U.S. 298 (1985)
Oregon v. Mathiason, 429 U.S. 492 (1977)
Patterson v. Illinois, 487 U.S. 285 (1988)
Payne v. Arkansas, 356 U.S. 560 (1958)
Simon D (1991) Homicide: a year on the killing streets. Houghton Mifflin, Boston
Spano v. New York, 360 U.S. 315 (1959)
State v. Patton, 826 A.2d 783, N.J. Super. A. D. (2003)
Townsend v. Sain, 372 U.S. 293 (1963)
United States v. Patane, 542 U.S. 630 (2004)

Law of Police Searches

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Overview

In the United States, all governmental law enforcement agents, whether federal, state, or local, must comply with the Fourth Amendment's search and seizure requirements. Unfortunately, those requirements are often unclear, and there is no consensus about the analytical method for determining them. One option is historical analysis, and the United States Supreme Court has increasingly employed it. However, there are significant differences between the law of police searches today and what existed at the nation's founding, and even the Court itself has resisted the consequences of more fully returning to a historical model. This resistance results from one of the great challenges in Fourth Amendment law, which is how to balance conflicting and likely irreconcilable imperatives, such as retaining a historical model in light of social, cultural, and technological change, or limiting governmental discretion or power in a time of increased interest in preventative policing and searching.

This entry covers only that part of Fourth Amendment law that applies to governmental agents engaging in search and seizure activity for traditional criminal law enforcement purposes. For ease of reference, such agents will be referred to as "law enforcement" or simply as "police."

Main Text

Fourth Amendment law as we know it today did not exist for the first century of our nation's existence, despite that search and seizure issues have been at the forefront of public concerns since colonial times. It was not until *Ex Parte Jackson*, 96 U.S. 727 (1877), that the Supreme Court considered the Fourth Amendment in a substantive (albeit brief) way, and the Court did not significantly discuss it until *Boyd v. United States*, 116 U.S. 616 (1886). During the preceding period, search and seizure issues were litigated through common law trespass claims, and partly for this reason, the Fourth Amendment came to be viewed through a property law lens.

As for the scope of its protection, for most of our nation's history, the Fourth Amendment bound only the federal government. This is because the Bill of Rights, of which the Fourth Amendment is a part, was originally understood to limit only federal power. During this period, the Fourth Amendment was technically inapplicable to non-federal actors, such as state or local police, whose actions were constrained only by state and local law. The reason why the Fourth Amendment applies to state and local police today is that the Supreme Court, in the mid-1900s, ruled that the Fourteenth Amendment's Due Process clause made the Fourth Amendment binding against the states (*Mapp v. Ohio*, 367 U.S. 643, 1961; *Wolf v. Colorado*, 338 U.S. 25, 1949).

The Fourth Amendment did not become an active subject of Supreme Court litigation until Prohibition, which had resulted in a large expansion in both federal law enforcement and its search and seizure efforts. Even then, the property-based focus persisted, despite the pressure that technological change was exerting on the jurisprudence. In *Olmstead v. United States*, 277 U.S. 438 (1928), for example, the Court rejected a Fourth Amendment challenge to the wiretapping of telephone conversations, emphasizing that the wiretapping was accomplished "without trespass upon any property of the defendants."

As time and technology advanced, however, concerns about the government's investigatory and surveillance powers continued to increase, to the point where the Supreme Court finally expressed dissatisfaction with the property model and introduced a privacy model in *Katz v. United States*, 389 U.S. 347 (1967), which held that electronic eavesdropping from the exterior of a telephone booth constituted a search subject to Fourth Amendment protections. Since then, *Katz* and its privacy model have served as the touchstones for all Fourth Amendment law. This dominance, however, may be ending.

Recently, in *United States v. Jones*, 132 S. Ct. 945 (2012), the Court clarified that both a privacy model and a property-centric trespass model are available bases upon which to claim Fourth Amendment rights.

In addition to the privacy/property dichotomy, the other debate that has strongly influenced Fourth Amendment jurisprudence concerns the relationship between its two clauses, the Reasonableness and Warrant Clauses. Through the 1960s and into the 1970s, the Court often engaged in Warrant Clause-primacy, in which reasonableness under the opening clause was determined in light of whether a valid warrant had been obtained. This approach underlies the ubiquitous formulation that searches and seizures are per se unreasonable when unsupported by a valid warrant, except in certain carefully limited exceptions. Starting in the 1980s, this approach has tended to give way to Reasonableness Clause-primacy, in which the ultimate touchstone of Fourth Amendment constitutionality is whether the governmental conduct at issue was reasonable. Under this view, the ultimate question of reasonableness need not, and indeed often is not, determined in light of whether law enforcement had obtained a valid warrant, and the Warrant Clause's function is simply to set forth the constitutional minima for obtaining a warrant, while saying nothing about when warrants are actually required. Increasingly, the Supreme Court has settled into the pattern of generally judging the constitutionality of criminal searches under the Warrant Clause, and that of civil searches by reference to the Reasonableness Clause.

Fourth Amendment jurisprudence in general, and that part which governs police searches specifically, is often criticized for lacking coherence. A great deal of that criticism stems from disagreement among Supreme Court justices about whether to apply a privacy or property model, whether to proceed from Reasonableness Clause primacy or Warrant Clause primacy, and from disputes about how to do so once those choices are made. One evident dynamic is that Warrant Clause-primacy has often resulted in increasing Fourth Amendment protections from governmental searches – and concomitantly greater restrictions on police search power – both on a substantive basis and because it results in clearer standards against which to gain suppression of evidence. A challenge to moving toward a Reasonableness Clause approach is assuring a sufficiently high threshold of protections against governmental searches and seizures and assuring sufficient coherence and predictability in the jurisprudence so that it amounts to more than merely the subjective reaction of the judicial officer reviewing a given Fourth Amendment issue.

Fundamentals

The Fourth Amendment's text explicitly mentions both searches and seizures. But the Fourth Amendment does not cover all searches and seizures, only those performed by governmental actors – such as all police searches – or by private actors but in mere acquiescence to governmental authority. Thus, for example, a spouse or landlord acting in a voluntary, private capacity is free to engage in search and seizure behavior that would violate the Fourth Amendment had it been engaged in by police and then share the results with police. That person's conduct might violate some other body of law, such as tort law, but it will not amount to a Fourth Amendment violation because it is private, not governmental, conduct.

The next issue in any Fourth Amendment challenge to police conduct is whether it amounts to a "search" or "seizure" covered by the Fourth Amendment. There are two search tests. *Katz* is ubiquitously understood as having established a two-factor privacy test for a search: a Fourth Amendment search occurs only if the target had (1) an actual, subjective privacy expectation and (2) an objective privacy expectation that society accepts as reasonable. Recently, *Jones* engaged in a historical analysis to clarify that an alternate, property-based search test continues to exist as well: a Fourth Amendment search occurs when (1) government physically trespasses (2) for the purpose of collecting information (3) upon an enumerated Fourth Amendment item (i.e., "persons, houses, papers, and effects"). Either *Katz*'s privacy-based search test or *Jones*'s property-based one or both may be invoked when seeking

Fourth Amendment protection. (When property is involved, the seizure standard is whether government has meaningfully interfered with a possessory interest (*Soldal v. Cook County*, 506 U.S. 56, 1992). Numerous seizure standards exist with regard to the detention of persons, e.g., *United States v. Drayton*, 536 U.S. 194 (2002); *United States v. Mendenhall*, 446 U.S. 544 (1980); *Terry v. Ohio*, 392 U.S. 1 (1968). Because this entry is devoted to police searches, it will not consider seizures in any detail.)

Once it has been established that a Fourth Amendment "search" has occurred, the next question to be determined is what conditions the Fourth Amendment imposes for the search to be constitutional. It is at this stage that a great deal of complexity and ambiguity exists in Fourth Amendment jurisprudence.

Many police searches are assessed under the Warrant Clause. Consequently, often, the next inquiry is whether a valid search warrant was obtained and, if not, whether a valid exception to a warrant requirement existed. The Fourth Amendment's text imposes only three requirements for a valid warrant: (1) probable cause, (2) particularity, and (3) oath or affirmation. Of these, most commonly disputed is whether probable cause existed, though such challenges have been less likely to succeed since *Illinois v. Gates*, 462 U.S. 213 (1983), because it imposed a practical, commonsense, nontechnical totality-of-the-circumstances test. To a lesser extent, particularity is also sometimes disputed. Though not explicitly specified in the Fourth Amendment, the Supreme Court has also imposed a judicial preclearance requirement for warrants. It mandates that police, when applying for a search warrant, explain the factual basis upon which probable cause is claimed to exist such that a neutral and detached magistrate can make an independent determination of whether it, as well as the particularity requirement, is satisfied prior to issuing the warrant (*Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 1979; *Giordenello v. United States*, 357 U.S. 480, 1958; *Nathanson v. United States*, 290 U.S. 41, 1933; *Byars v. United States*, 273 U.S. 28, 1927). Search warrants can also be subject to other, nonconstitutional requirements, like those in Federal Rule of Criminal Procedure 41, or in relevant statutes such as those that apply to certain forms of electronic surveillance.

Though it sounds odd, Warrant Clause primacy need not result in imposition of a warrant requirement, strict application of which is incompatible with the realities of quotidian police duties. Often, police are called upon to respond to quickly developing situations, and they could not perform their jobs and adequately protect public safety if required to obtain a warrant prior to intervening. Traffic stops, for example, could not possibly comply with a warrant requirement. As a result, the presumptive warrant requirement quickly began developing exceptions. Though these are claimed to be "carefully delineated," many commentators and at least one Supreme Court justice believe that the list of exceptions is now so broad as to have swallowed the rule (*California v. Acevedo*, 500 U.S. 565, 1991; Scalia, J., concurring).

Of such exceptions, an important one is that seizures can be made based upon only probable cause, with the scope of the seizure (e.g., its duration) being limited by the nature of the probable cause. Traffic stops provide an example. This probable cause standard is considered to be consistent with Warrant Clause primacy given that "probable cause" appears in that clause. Because no warrant is required, this probable cause standard is not subject to judicial preclearance. A probable cause challenge can be raised after the search, however.

Police searches can alternately be analyzed under the Reasonableness Clause. A prime example is police stop-and-frisk activity, which the Supreme Court allowed in *Terry* based upon reasonable suspicion, which is a lower suspicion threshold than probable cause. The move away from the Warrant Clause in favor of the Reasonableness Clause resulted in greater flexibility, allowing the Court to evade an otherwise applicable probable cause requirement. Stops and frisks are comprised of an initial seizure and search encounter (the stop) and may be followed by a second, more intrusive search (the frisk). The stop requires reasonable suspicion that a crime may be afoot and justifies police in detaining

(seizing) an individual and engaging in investigatory questioning (a limited search). Frisk authority, because it is more intrusive, does not automatically follow from the stop, but instead requires reasonable suspicion not just of a crime but also of danger. The greater discretion that stop-and-frisk authority provides police has often caused it to be highly controversial and has contributed to claims of abused police authority and to distrust of police, particularly in low-income or minority communities.

There are many circumstances in which police may search based only upon probable cause or reasonable suspicion, and sometimes, no suspicion at all. Many of these circumstances can be grouped under the umbrella category of exigency, and they include hot pursuit, the automobile exception (which allows automobiles to be searched based upon only probable cause), and the search-incident-to-arrest doctrine (which, after an arrest, allows an immediate search of the arrestee as well as the "grabbing area" around him).

Two doctrines that allow police to engage in suspicionless searches, but do not fall under the exigency rubric, are plain view searches and consent-based searches. Plain view searches comply with the Fourth Amendment when police are lawfully in the place from which they observe an item whose incriminating character is immediately apparent. Thus, due to the plain view doctrine, a valid traffic stop can result in a much more serious criminal prosecution if police see illegal drugs in open view inside the vehicle. Consent-based searches are discussed in greater detail below.

Key Issues and Controversies

Role of History: Limited vs. Big Government, Urbanism, and Prohibition

Though the Supreme Court has increasingly called for giving greater weight to history in Fourth Amendment analysis, the utility of history as an analytical tool is actually quite limited because the modern world bears little resemblance to the world that existed at the nation's founding, and consequently, many policy imperatives have changed over time, sometimes completely reversing course. For example, the historical record is quite clear that, at nationhood, the primary Fourth Amendment goal was to constrain governmental search discretion. By contrast, Fourth Amendment jurisprudence today is designed to extend tremendous discretion to governmental searchers. Another reason why history is of limited utility is that, although widespread agreement exists about many of the relevant historical data points, radically different opinions exist about the implications of that history.

When considering history, Anglo-American history naturally dominates. At the nation's founding, constraining official discretion was an understandable goal given colonial history, which included complaints and, especially, extravagant rhetorical warnings that royal agents were infringing or would infringe upon colonial rights through an overbearing search power. This search power was exercised in the customs context to enforce tax laws. An attempt to extend it to excise taxes resulted in the 1765 Stamp Act riots. The Fourth Amendment is generally thought to include the Warrant Clause to constrain search discretion by establishing demanding standards under which search warrants can issue, and thus constitutionalize a ban against "writs of assistance" (official documents that were used to enforce customs laws) and general warrants, both of which provided unconstrained discretion to the search official.

In the years after nationhood, the federal government enacted customs laws that essentially parroted the British ones that had applied to the colonies – and which colonists had protested – including with regard to search and seizure provisions. The British statutes had constrained discretion by extending immunity to the searchers if, after the search, it was determined that probable cause had existed. Federal revenue laws used probable cause in the same way.

Those aggrieved by searches had recourse through a common law trespass action or, if federal revenue laws were at issue, possibly also through a civil law forfeiture action. However, if a federal revenue law was at issue, the probable cause determination was usually taken away from

a jury and reserved for a federal judge. Searches that had occurred for purposes other than enforcing federal revenue laws, such as those that we think of today as classic police searches – searches for stolen goods, for example – were also subject to a legal regime that sought to constrain discretion through a combination of warrant procedures and liability for unsuccessful searches. This system, however, bears little resemblance to Fourth Amendment jurisprudence today because in our early history there was no professionalized police force. Thus, investigatory and search authority was left to private parties, who could seek a search warrant and assistance from a constable or sheriff in executing the warrant. Such governmental officials who acted under authority of an ostensibly valid search warrant were immunized from damages. The private party who swore out the warrant, however, would be liable if the search was unsuccessful, which acted to constrain search discretion.

A good example of the disjunction between modern and historical approaches to Fourth Amendment law concerns probable cause. Today, probable cause is often an important mechanism for protecting the public from improper police searches. This is certainly true as to warrant-based searches and is often true with regard to warrantless searches, which often are authorized merely upon probable cause. (One important difference in how probable cause is regulated in these two situations is that, in the former, probable cause can be assessed twice, once through judicial preclearance when the warrant is applied for and again after the search during a suppression or damages proceeding, but in the latter, it is assessed only after the fact.)

But much evidence indicates that during the nation's early history probable cause may have been a much less protective device. Though explicitly mentioned in the Fourth Amendment, when it was included there it was an immature concept that legal treatises indicated could be satisfied under conditions that would never be acceptable today, such as being a nightwalker or living an idle, vagrant, and disorderly life. Moreover, evidence suggests that probable cause played an especially important role only during federal revenue enforcement actions, where statutes used it as an immunity factor. Probable cause may have been a much less protective concept under the common law, for several reasons. It is accepted today that judges have a well-established duty to independently assess the adequacy of probable cause before issuing search warrants to police. But considerable historical evidence indicates that in our nation's early history the validity of probable cause supporting a warrant often would have been subject only to an after-the-fact jury determination through a common law trespass action. Judicial officers who issued search warrants may often have perceived their role with regard to probable cause as being merely ministerial, such that they may have treated an assertion of probable cause as a mere pleading requirement, the validity of which a jury could later decide. Juries, however, could so decide only if a judicial challenge was brought – which was rare then, as now – and even then could have their opinion nullified by a federal judge if a federal revenue law was at issue.

Using history as a guide to current Fourth Amendment law is a challenge because so much has changed over time. The conception and importance of probable cause, and the role of the jury, are just several examples. As time has passed, the original guiding imperative of limiting search discretion has given way to a desire to greatly expand search discretion. The reasons for this switch are numerous and include the move from rural to urban populations, which increased anonymity and hence crime and resulted in the creation of modern professionalized police forces, as well as persistent advances in technology that have vastly magnified both the harm one individual can inflict and the interest in, and capabilities of, surveillance, which increase the pressure to engage in preventative searches. For example, recent research persuasively argues that the key event in transforming the Fourth Amendment law of police searches to what we have today was the advent of the temperance movement of the late 1800s, which culminated in Prohibition and a significant increase in federal law enforcement (Oliver 2011). Indeed, several Prohibition cases, such as *Carroll v. United*

States, 267 U.S. 132 (1925), which involved automobile searches, and *Olmstead*, which involved wiretapping, resulted in important Fourth Amendment decisions (though later *Katz* famously overruled *Olmstead*). These changing circumstances have resulted in a desire to assure adequate governmental power to protect us from third parties, and thus the law of police searches has moved dramatically in the direction of expanding governmental discretion.

Consent, Police Intent, and Discrimination

The law of police searches with regard to consent and police intent operates to greatly expand police discretion. The premises underlying consent searches are that police should not operate at any disability as compared with a private actor and thus may seek voluntary assistance and compliance as could any private actor, and that the target has full knowledge about whether the encounter is truly voluntary or is subject to governmental compulsion (*Kentucky v. King*, 131 S. Ct. 1849, 2011). The latter presumption often operates to make consent-based searches controversial. For example, often there is no way for a person stopped by police on a sidewalk or in an airport or bus terminal to know whether police are acting under probable cause or reasonable suspicion, which would authorize a compelled detention. Similarly, every traffic stop at some point exhausts the probable cause justification for the seizure, but that point is often inscrutable to the driver. Thus, when a person is approached by police and asked, "Do you mind if I ask you a few questions?" or a driver is asked "By the way, do you mind if I look around?" it is often unclear whether a truly voluntary choice exists, particularly given that many jurisdictions make it a criminal offense to cut short a justified police encounter, as in the case of traffic stops. The controversy exists in large measure because the Supreme Court has ruled that consent need only be voluntary, not knowing, and thus police need not inform the target that he or she has a right to refuse consent (*Schneckloth v. Bustamonte*, 412 U.S. 218, 1973) or a driver that he or she is free to go instead of granting consent (*Ohio v. Robinette*, 519 U.S. 33, 1996).

Adding further controversy to the law of police searches is that, generally, only objective police intent is relevant to Fourth Amendment constitutionality, while subjective police intent is immaterial. Consequently, Fourth Amendment law makes it very difficult to prevail on claims of either invidious discrimination in police searches or on pretext claims such as that a minor traffic stop was really a subterfuge for forcing a police interaction (*Whren v. United States*, 517 U.S. 806, 1996). The Supreme Court justifies the focus upon objective intent based on ease of judicial application, a desire to treat similar police actions similarly regardless of whether different subjective motivations animated them, and the difficulty of establishing subjective intent.

Fourth Amendment consent and intent doctrines are often the source of great tension between police and poor or minority communities because these doctrines can effectively immunize police behavior motivated by actual invidious discrimination. For example, they can make it very difficult to challenge racial profiling, despite that it has been documented in traffic stops. Whether the Fourth Amendment law of police searches is properly formulated on these points is a significant issue because, by far, the greatest amount of face-to-face interaction between police and the public is during traffic stops. Thus, these Fourth Amendment doctrines are often highly criticized.

Arrest Authority and Strip Searches

Yet an additional example of the large amounts of deference extended to police under modern Fourth Amendment law is seen in the low levels of protection extended against dubious arrests and their ensuing consequences such as strip searches at detention centers. The Supreme Court has rejected a mother's claim that the Fourth Amendment protected her from being arrested for the minor criminal offense of failing to secure herself and her two children in her pickup truck, despite acknowledging that "the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor

judgment" (*Atwater v. City of Lago Vista*, 532 U. S. 318, 2001). A very persuasive case has been made that *Atwater* is completely at odds with a historical view of the Fourth Amendment (Davies 2002). The Court has also refused to provide Fourth Amendment protections from arrests that violate state law, reasoning that Fourth Amendment and state standards are distinct and that the Fourth Amendment is satisfied so long as probable cause supported the arrest (*Virginia v. Moore*, 553 U.S. 164, 2008).

Arrestees are taken to detention centers, and recently, the Supreme Court has ruled that, once there, all adult arrestees may be subjected to suspicionless strip searches, including visual body cavity searches, and that the Fourth Amendment provides no protection even if the arrest was wrongful, such as because it was based upon the erroneous belief that an arrest warrant existed (*Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510, 2012). The degree of deference that the Supreme Court extended to detention centers was striking because the Court could easily have endorsed a reasonable suspicion requirement for such strip searches given that a prior case, *Bell v. Wolfish*, 441 U.S. 520 (1979), had widely been interpreted as imposing such a suspicion threshold before arrestees – who, after all, have yet to be adjudicated guilty of any offense – could be strip searched. Substantial uncertainly exists as to whether similar institutional deference will be extended in the context of suspicionless strip searches of juvenile arrestees given that the Court has required reasonable suspicion to justify strip searches in high schools, as well as proportionality between a search's intrusiveness and the suspected harm being investigated (*Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364, 2009).

Surveillance and Technology

Fourth Amendment law has consistently struggled with whether, and how, to adapt to technological change. This dynamic became evident in the early 1900s as technology started rapidly advancing, which, for example, made wiretapping possible. Today, this is a consistently pressing issue given the accelerating pace of technological change, which has contributed to an increased interest in preventative searches as a result of heightened security concerns in a post-9/11 world.

The Supreme Court usually has taken a careful approach to technological development, often refusing to recognize Fourth Amendment privacy barriers to its use, though infrequently the Court has intervened even at the risk of dramatically changing Fourth Amendment law. One prominent distinction the Court has applied in Fourth Amendment technology cases is whether the technology merely involves sense enhancement or augmentation, on the one hand, or sense replacement or the use of what the Court believes is a disruptive technology, on the other.

Two of the Supreme Court's most important Fourth Amendment rulings fell into the latter category, which shows what an important role technology has had in developing the jurisprudence. One was *Katz*, in which the Court adopted a privacy model, and rejected a property model, in holding that the public enjoyed Fourth Amendment protections against electronic eavesdropping. The second was *Jones*, a recent decision in which the Supreme Court unanimously ruled that police installation and monitoring of a GPS device upon a suspect's vehicle was subject to Fourth Amendment oversight. *Jones* is significant not just for its reaffirmation that a property-based trespass model exists as a basis to seek Fourth Amendment protections (in addition to *Katz*'s privacy model) but also for what the concurring opinions suggest about the future direction of Fourth Amendment law in general and the law of police searches in particular.

Justice Alito wrote a concurring opinion, explaining that he would have resolved the case through a *Katz*-ian privacy analysis that would have focused upon objective privacy expectations. In the context of GPS technology, he would have applied two new, revolutionary factors to the objective prong: a temporal factor and an offense-specific factor. With regard to the temporal factor, he would have ruled that no objective privacy expectation exists in the context of "short-term" GPS tracking but that one does usually exist in the context of "longer term" GPS tracking. He provided no guidance as to

what separates brief from prolonged GPS tracking other than to say that the GPS tracking at issue, which spanned 28 days, clearly qualified as prolonged. As for the offense-specific factor, he would have ruled that prolonged GPS tracking would violate an objective privacy expectation in the case of "most offenses" but suggested that this might not be true for "extraordinary offenses." His discussion of the offense-specific exception indicates that it is not defined in terms of distinct offense categories. Rather, it is really a resource-intensity measure, which the government can successfully invoke if it can show that it would have approximated similar surveillance results through traditional means had it not used GPS tracking, even if that meant an unusual commitment of resources. Because three other justices joined Justice Alito's concurrence, there are at least four votes on the current Supreme Court for incorporating these two revolutionary factors into *Katz*'s objective privacy expectation analysis.

There also appears to be a fifth vote available because Justice Sotomayor, though she provided a fifth vote for resolving *Jones* on property/trespass grounds, wrote a separate concurrence indicating that she was prepared to support Justice Alito's privacy approach.

Significantly, she also specified that she was willing to go even further than Justice Alito in extending Fourth Amendment protections against technological surveillance, even if it meant fundamentally reforming Fourth Amendment privacy jurisprudence. Police searches often take advantage of three interrelated Fourth Amendment doctrines, all of which are closely tied to *Katz*-ian privacy. One is the third-party doctrine, under which exposure of information to third parties, even in instances where there is little alternative, can obviate any privacy interest and thus eliminate Fourth Amendment protections (*Smith v. Maryland*, 442 U.S. 735, 1979; *United States v. Miller*, 425 U.S. 435, 1976). Another is the assumption of risk doctrine, under which privacy interests in information can be lost when voluntarily shared with a third party because one assumes the risk that the third party will disclose the information (*United States v. Jacobsen*, 466 U.S. 109, 1984; *Frazier v. Cupp*, 394 U.S. 731, 1969). The assumption of risk doctrine is particularly useful to police in the context of informants and co-occupants (*United States v. Matlock*, 415 U.S. 164, 1974; *United States v. White*, 401 U.S. 745, 1971). Finally, some Fourth Amendment law suggests a private-versus-public space distinction, in which no privacy expectation exists as to activities conducted in public, such as movements through public spaces or roads (*United States v. Knotts*, 460 U.S. 276, 1983). *Jones* is important in part because Justice Alito's and Justice Sotomayor's concurring opinions could have transformative implications for these three Fourth Amendment doctrines.

Additionally, some judicial opinions assessing GPS tracking had embraced mosaic theory as a means for the Fourth Amendment to keep up with technology, and Justice Alito and the three justices who joined his opinion seem to endorse it in *Jones*, and Justice Sotomayor clearly embraces it. In a search and seizure context, mosaic theory posits that privacy interests should be protected in a manner that guards against collections of small bits of information that individually may not be particularly revealing but that when aggregated can reveal a great deal. Justice Alito's temporal factor seems to implicitly endorse mosaic theory because a prime differentiating factor between brief and prolonged GPS tracking is the amount of data revealed to police. Justice Sotomayor was more direct in endorsing mosaic theory, so she clearly seems to be one available vote for importing it into Fourth Amendment jurisprudence. If these five justices are indeed willing to make this outcome law, it would significantly alter the law of police searches, at least in the context of technological surveillance.

Legislation, Technology, and National Security

In part because the Supreme Court often has been cautious in extending Fourth Amendment protections in technological contexts, the political branches have played an important role in defining the law of police searches. For example, when the Supreme Court created the third-party doctrine by ruling in *Smith* that there is no Fourth

Amendment privacy interest in telephone numbers dialed from one's home (because the telephone company keeps records of those numbers) and in *Miller* by holding that no privacy interest exists in one's banking records (because the bank holds them), the political branches responded by creating statutory protections through passage of the Pen Register Act, 18 U.S.C. §§ 3121–27 and the Right to Federal Privacy Act, 12 U.S.C. §§ 3400–22. Privacy standards that the political branches have created and defined have also strongly influenced the law of police searches through the Federal Wiretap Act, 18 U.S.C. §§ 2510–22 and the Stored Communications Act, 18 U.S.C. §§ 2701–12. When such statutory protections exist, it is important to understand that they may not necessarily comply with Fourth Amendment standards, especially in contexts where the political branches have taken the lead. For example, currently there are numerous controversies concerning the terms under which the Stored Communications Act allows the police to access cellular and GPS location data held by third-party service providers and whether those statutory terms meet Fourth Amendment standards.

Some of the uncertainty exists because the law of police searches has been significantly impacted by national security concerns. After the September 11, 2001 terrorism attacks, for example, Congress statutorily authorized the Attorney General, through one portion of the USA PATRIOT ACT, 50 U.S.C. § 1843, to use pen registers without prior court approval in emergency circumstances relating to international terrorism and foreign intelligence. There is evidence that governmental surveillance powers that were expanded post-9/11 for national security purposes have been used in the domestic law enforcement arena.

Remedies: The Exclusionary Rule, the Right to Counsel, and Qualified Immunity

An important issue in Fourth Amendment law is what remedies, if any, exist for a violation of the rights conferred against governmental searches and seizures. The primary question concerns the legitimacy of the exclusionary rule: whether exclusion of wrongfully obtained evidence should be an available remedy. Textually, the Fourth Amendment identifies rights but is silent about remedies. Early on, the Supreme Court in *Boyd* at least presumed that exclusion was proper, and then formally adopted exclusion as a remedy for Fourth Amendment search and seizure violations by the federal government in *Weeks v. United States*, 232 U.S. 383 (1914). Thirty-five years later, in *Wolf*, the Court declined to impose exclusion as a Fourth Amendment remedy against violations by state actors, on the theory that the device by which the Fourth Amendment was incorporated against the states – the Fourteenth Amendment – did not require it, but the Court switched course 12 years later in *Mapp*, in part on the ground that experience had shown that exclusion was the only effective remedy.

The exclusionary rule is controversial because, as famously phrased, "[t]he criminal is to go free because the constable has blundered," *People v. Defore*, 150 N.E. 585 (N.Y. 1926), and as a result, bare majorities of the Supreme Court have been on an active campaign for decades to minimize or eliminate it, as in *United States v. Leon*, 468 U.S. 897 (1984) (adopting good-faith exception for reasonable police reliance on search warrant subsequently held invalid), and this campaign has accelerated in the last decade. As originally conceived, the exclusionary rule was justified on the twin bases of judicial integrity and deterrence value. The campaign against it has rejected the judicial integrity rationale and has used the only remaining justification – deterrence – to require a cost-benefit analysis before wrongfully obtained evidence can be suppressed, while both emphasizing its costs and minimizing its benefits (*Herring v. United States*, 555 U.S. 135, 2009; *Hudson v. Michigan*, 547 U.S. 586, 2006).

A major debate surrounding the exclusionary rule is whether, as *Mapp* conceived, it is the only effective remedy for Fourth Amendment violations. Opponents of the exclusionary rule identify numerous intervening reforms since *Mapp* which, they assert, mean that the rule is no longer needed. They point to the increased professionalism of police forces and to federal civil rights statutes that authorize civil suits and the availability of attorney's fees for prevailing plaintiffs,

as well as to increases in the number of public-interest law firms and civil rights lawyers (*Hudson*). Supporters of the exclusionary rule point to the increased professionalism and improved training of police forces as evidence of both the success and necessity of exclusion as a remedy, *Herring* (Ginsburg, J., dissenting), and assert that alternate remedies are not sufficiently available and successful.

In this debate, insufficient attention has been paid to the role of assigned counsel and to the impact of the qualified immunity defense. The Sixth Amendment provides a right to counsel in criminal cases involving a felony or before a sentence of incarceration may be imposed. This provision of counsel has played a singular role in the development of the law of police searches because it has guaranteed the presence of a legal professional to assess each client's situation and to vigorously and aggressively litigate potential Fourth Amendment claims. If, however, the exclusionary rule is eliminated or so emasculated that there is no incentive to litigate such claims during a criminal trial, the development of Fourth Amendment law will greatly suffer. This is because alternative remedies to the exclusionary rule often will be more theoretical than real for several reasons. The number of public-interest law firms and civil rights attorneys available to bring such claims pales by comparison to the number of assigned counsel in criminal cases. An aggrieved Fourth Amendment claimant who cannot enlist a public-interest law firm is left with no other choice but to hire a private attorney, but few such claimants can afford such legal representation. This representation deficit is further exacerbated by the lack of meaningful damages that would be available in most civil cases – particularly where the client was held guilty in the criminal proceeding – and by the difficulty in collecting statutory attorney fees in civil rights cases, a difficulty that has been magnified through rulings spearheaded by many of the same Supreme Court justices who are hostile to the exclusionary rule and point to such attorney fees as an alternative.

The qualified immunity defense also has a significant role in limiting the effectiveness of remedies other than the exclusionary rule. The qualified immunity defense protects police from civil suits for damages when a constitutional right has been violated but was not clearly established at the time of the violation. The law of qualified immunity is often extremely generous to police – again often through efforts by the same group of Supreme Court justices who oppose the exclusionary rule – which often makes it difficult to win on claims that a constitutional right was clearly established. This can be particularly ironic because, though the Court has increasingly insisted that historical analysis should play a leading role in Fourth Amendment law, the Court has at the same time rejected the relevance of historical Fourth Amendment analysis when it would operate to defeat a qualified immunity defense (*Anderson v. Creighton*, 483 U.S. 635, 1987). This rejection is significant because the common law of search and seizure was often quick to impose liability upon a government official who acted improperly.

Conclusion

Fourth Amendment law in general, and as it applies to police searches in particular, is at a crossroads. Though recently the Supreme Court has given more emphasis to historical analysis, in reality the Court's record in aligning modern Fourth Amendment law with the historical law of search and seizure is poor.

This outcome was foreordained because circumstances have simply changed too dramatically for a historical model to dominate. A good example of why can be seen in the advance of technology, which forces a Fourth Amendment reckoning absent any historical analogue. Moreover, technology also puts pressure on the core Fourth Amendment protective concept upon which we have relied – prior suspicion. Prior suspicion has come to occupy pride of place in Fourth Amendment law because of history. Historically, suspicion was the primary concept used to restrict search discretion, which was the overarching goal for which the Fourth Amendment was adopted. For more than a century, suspicion

fulfilled this function well. At the nation's founding, the world was simpler and in that context suspicion was a particularly useful mechanism for limiting governmental power and discretion. As time advanced, however, circumstances changed and the world became increasingly complex and interconnected – for example, life in the United States moved from an agrarian to an urban existence, and technological advances accelerated – and consequently suspicion became less protective. This dynamic can be seen in the evolution of Fourth Amendment law, which started from a presumptive warrant requirement, then began departing from that requirement and instead relied more often only upon probable cause, and then in *Terry* created an exception to even probable cause through the creation of a less demanding reasonable suspicion model. Technological advances continue to put pressure upon suspicion because they increase the ability to engage, and interest in engaging, in preventative searches, such as through various forms of electronic surveillance.

Therefore, a significant challenge that currently exists in Fourth Amendment law, including with regard to police searches, is how to assure adequate search and seizure protections when suspicion can no longer play the protective role that it once did. This crisis comes with a benefit – the opportunity to expand and reassess our thinking about the Fourth Amendment – but it is one that must be embraced and pursued. Doing so requires the recognition that suspicion is not alone sufficient to assure a search's constitutionality because the Fourth Amendment protects a host of values, and suspicion protects only some of them. A search can be unconstitutional under the Fourth Amendment for many reasons. It might have been overly invasive or intrusive, the governmental interest being pursued might not have been sufficiently compelling, the search target's privacy interests could have been so substantial as to render the search illegitimate, or the search may not have been sufficiently efficacious or had sufficient deterrence value to justify the measures employed. Such interests are ones that the Fourth Amendment protects, but that suspicion does not. Thus, one avenue that might beneficially be pursued is to reform the Fourth Amendment law of police searches to more precisely and distinctly identify and consider the varied and multiple interests that the Fourth Amendment protects in various circumstances and ask whether the police conduct adequately respected them given the circumstances.

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- ▶ School Security Practices and Crime
- ▶ Strategies of Policing Terrorism
- ▶ Surveillance Technology and Policing
- ▶ Theories on Policing and Communities
- ▶ Traffic Police

Recommended Reading and References

Amar AR (1994) Fourth amendment first principles. Harv Law Rev 107:757–819
Arcila, Jr. F (2010) The death of suspicion. William & Mary Law Rev 51:1275–1341
Clancy TK (1995) The role of individualized suspicion in assessing the reasonableness of searches and seizures. Univ Memphis Law Rev 25:483–635
Cuddihy WJ (2009) The fourth amendment: origins and original meaning 602–1791. Oxford University Press, New York
Davies TY (1999) Recovering the original fourth amendment. Mich Law Rev 98:547–750
Davies TY (2002) The fictional character of law-and-order originalism: a case study of the distortions and evasions of framing-era arrest doctrine in *Atwater v. Lago Vista*. Wake Forest Law Rev 37:239–437
Dickerson OM (1939) Writs of assistance as a cause of the revolution. In: Morris RB (ed) The era of the American revolution: studies inscribed to Evarts Boutell Greene. Columbia University Press, New York, pp 40–75
Lasson NB (1937) The history and development of the fourth amendment to the United States Constitution. Johns Hopkins Press, Baltimore
Maclin T (1997) The complexity of the fourth amendment: a historical review. Boston Univ Law Rev 77:925–974
Oliver WMN (2011) The modern history of probable cause. Tennessee Law Rev 78:377–429
Sklansky DA (2000) The fourth amendment and common law. Columbia Law Rev 100:1739–1814
Taslitz AE (2006) Reconstructing the fourth amendment: a history of search and seizure, 1789–1869. New York University Press, New York
Thomas GC III (2005) Time travel, hovercrafts, and the framers: James Madison sees the future and rewrites the fourth amendment. Notre Dame Law Rev 80:1451–1518

Law of Police Seizures and the Exercise of Discretion

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Overview

Our society grants the police extraordinary powers. This is not to suggest those powers are limitless. While many police departments have internal rules and guidelines that limit their behavior with respect to the seizure of persons or property, the most important limitations originate in the Fourth Amendment or more specifically in Supreme Court cases explicating the Fourth Amendment. The Fourth Amendment provides in its entirety, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." From these 54 words, a rich body of case law has developed governing searches and seizures. In addition, the Supreme Court has developed a rule of exclusion that generally requires the exclusion of evidence obtained in violation of the Fourth Amendment. The law of searches and the exclusionary rule are both beyond the scope of this entry, which focuses on the law of seizures and the exercise of discretion.

By its terms, the Fourth Amendment governs two types of seizures: the seizure of things (or more precisely, tangible property) and the seizure of persons. The law of each is different, and each is addressed in turn.

Fundamentals and Key Issues

The Seizure of Tangible Property

The first task in understanding constitutional limitations with respect to the seizure of tangible property is to understand what constitutes a seizure. The Supreme Court has stated that a seizure occurs "when there is some meaningful interference with an individual's possessory interests in that property." In fact, this is a rather common sense approach to defining seizures. As such, a seizure, within the meaning of the Fourth Amendment, occurs when a police officer takes possession of someone's property, for example, a purse or watch. Likewise, a seizure occurs when the police exercise control over property such that it is no longer available to a person.

For example, when a police officer conducts a traffic stop for a traffic violation, a seizure of the vehicle has occurred during the period that the driver or other occupants are prohibited from using the vehicle. The key is that there must be more than only minor interference over the tangible property. Accordingly, moving a sheet of paper a few inches because it is obscuring the serial number of a television does not constitute a seizure of the paper. Similarly, photographing the exterior of a house from a public sidewalk would not constitute a seizure of the house.

However, caution must be exercised in distinguishing between the seizure and search implications of police action. In the examples described above, the movement of the sheet of paper does not so meaningfully interfere with possessory rights to form a seizure of the paper; however, the conduct would constitute a search because it exposes the otherwise obscured serial number to public view. Similarly, photographing the exterior of a house is not a seizure of the house, but "photographing" the interior of the home using heat-detecting thermal technology would constitute a search within the meaning of the Fourth Amendment.

If police conduct amounts to a seizure of property, the second task is to determine whether the seizure is permissible. The Supreme Court has held that police may initiate brief, temporary seizures of property as long as they are reasonable. For example, if the police suspect – but do not yet have probable cause to show – that a suitcase contains narcotics, they can interfere with the owner's possessory rights for a very short period, only so long as necessary to bring a drug-sniffing dog to the scene.

In general, however, the Supreme Court has required that all police seizures of property be supported by probable cause to believe that the item seized will aid in a particular apprehension or conviction. Although the preference is for the determination of probable cause to be made by a neutral and detached magistrate through the issuance of a warrant, in recent years the Supreme Court has relied on the Fourth Amendment's prohibition against "unreasonable" searches and seizures to excuse the warrant requirement when a search or seizure without a warrant is reasonable. In general, when it is practical to secure a warrant, a warrant will be required. When it is not practical, the warrant requirement may be excused. A brief example illustrates this distinction. If the police have probable cause to believe that evidence of an identity theft operation will be found in someone's home, a warrant will normally be required to search and seize the evidence. By contrast, if the police have probable cause to believe that evidence of an identity theft operation will be found in someone's home *and* they have reason to believe that the evidence may be destroyed or relocated before they can secure a warrant, a search and seizure will be permitted without a warrant under the exigency exception. Because of the mobility of automobiles, this exception will often permit a search and seizure of items in an automobile without a warrant, so long as there is probable cause to believe the automobile contains contraband. Similarly, the police may seize, without a warrant, any item that is in "plain view" so long as the officer observes the item from a lawful vantage point, has physical access to the item, and has probable cause to believe the item is contraband or evidence of crime. Consider an example in which the police are summoned to respond to a domestic violence call. If, while responding to the domestic violence call, the police observe illegal drugs in plain view, they may seize it.

Lastly, it should be noted that the warrant requirement, and even the probable cause requirement, may be excused when the government has special needs, other than the detection of crime, justifying a seizure. For example, automobile checkpoints designed to check drivers for evidence of intoxication have been justified under the special needs exception, when the primary goal is to insure public safety on the roads, rather than to make arrests. A similar rationale allows temporary detentions at international borders as well as temporary searches and seizures at airports. Since 9/11, the use of special needs searches and seizures, of both persons and property, has grown exponentially.

The Seizure of Persons: Arrests

The seizure of persons is more complicated. Clearly, an arrest of a person constitutes a seizure. Such a seizure must be supported by probable cause to believe that a crime was committed and that the person to be arrested committed the crime. Beyond the probable cause requirement, the law regarding arrests is fairly straightforward. Absent exigent circumstances or consent, the police must secure an arrest warrant before making an arrest in the arrestee's home. If the police want to enter a third party's home to locate the arrestee, they must go still further and obtain a search warrant for the home. By contrast, the police may arrest a person in a public space with or without a warrant, so long as the probable cause requirement is satisfied. To protect against erroneous arrests, a defendant is entitled to a "prompt" postarrest assessment of probable cause by a magistrate, often referred to as a "probable cause hearing." In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Supreme Court held that a jurisdiction "that provides judicial determinations of probable cause within 48 h of arrest will, as a general matter, comply with the promptness requirement."

The Seizure of Persons: Terry Stops

A seizure can also occur as a result of activity that falls far short of an arrest. The seminal case permitting seizures short of arrest is *Terry v. Ohio*, 392 U.S. 1 (1968).

In *Terry v. Ohio*, the Supreme Court considered for the first time whether a person could be detained in the absence of probable cause to believe that he had committed a crime, the usual prerequisite for an arrest. On its face, such a seizure would seem to violate the "probable cause" language of the Fourth Amendment. However, weighing the Fourth Amendment in the context of rising crime rates, and placing newfound interest in the Fourth Amendment's reasonableness clause, the Supreme Court interpreted the Fourth Amendment as permitting a limited detention and questioning of a person as long as an officer has specific and articulable facts, that is, reasonable suspicion, to believe that "criminal activity may be afoot." Expressing concern for the safety of officers, the Court went a step further. If the officer also has reasonable suspicion that a person is armed and dangerous, the officer can couple the limited detention and questioning with a pat down for weapons: in common parlance, a stop and frisk.

It should be noted that *Terry v. Ohio* recognized that permitting stops and frisks based on reasonable suspicion would invest officers with a fair amount of discretion. The Court also noted that stop and frisk practices, which the police had already been engaging in for years, were not race neutral and would continue to disproportionately burden minorities. Nonetheless, the Court accepted these disadvantages and interpreted the Fourth Amendment as permitting the practice of forcibly stopping individuals based on "reasonable suspicion."

Several external factors might explain the Court's decision to allow reasonable suspicion as a compromise between barring all stops absent probable cause and ceding complete discretion to the police to engage in stops without judicial oversight. Just 4 months after oral argument, and 2 months before issuing its decision, riots broke out in cities across the nation, including Washington, DC, suggesting that what was needed was more state police power, not more individual rights. In addition, the Court and Chief Justice Warren in particular had been criticized during the 1964 presidential campaign for promoting individual rights at the expense of law enforcement and were expected to be targeted again in the 1968 campaign.

While it is impossible to say with any certainty what role these external events played in *Terry*'s outcome, what is certain is that, by settling for the compromise of reasonable suspicion, *Terry* had the effect of ushering in a shift in direction that, while providing a basis for judicial oversight, would eventually invest officers with almost unfettered discretion to initiate brief, investigatory seizures of individuals.

Because arrests must be supported by probable cause, and stops merely by reasonable suspicion, disputes often arise regarding whether a person's seizure amounts to an arrest or a stop.

Arrests include not only formal arrests but also de facto arrests in which what may have started as a stop takes on the indicia of a custodial arrest. Courts evaluating the level of seizure consider the totality of circumstances surrounding the situation, including the length of the detention, whether the person was moved during the detention, and whether the police seized the person's possessions.

Controversies

What *Terry* has meant in practice, and what *Terry* means to many, is the apprehension of criminals. *Terry* is even preventative. It allows the police to stop and question not only those individuals they suspect of having committed a crime but also those individuals who they suspect may be about to commit a crime.

But the discretion that is inherent in *Terry* stop and frisks remains controversial. The vast majority of individuals stopped and questioned by the police are not engaged in criminal activity nor are they carrying weapons or contraband. That most stops and frisks affect innocent people, however, does not render them unlawful. Put differently, *Terry* authorizes stops and frisks based on mere reasonable suspicion (less than probable cause), regardless of whether those suspicions prove accurate or not.

Furthermore, it is difficult to know what proportion of stops and frisks that affect innocent people are in fact based on suspicions that were, at the time, reasonable. For the vast majority of the law-abiding citizens stopped, questioned, and even frisked by the police before being let go, there is no record of an arrest, no charge number, and no prosecution. Accordingly, those stops and frisks for the most part remain beyond public or judicial scrutiny. By definition, there is no exclusion of evidence, the remedy for a Fourth Amendment violation, because there is nothing to exclude. And because there is nothing to exclude, the affected citizens are unlikely to initiate judicial review of the police conduct, thereby leaving most stops and frisks outside of public scrutiny.

Of equal concern is the malleability of reasonable suspicion. As Justice Thurgood Marshall noted some years after *Terry* was decided, reasonable suspicion is often little more than a "chameleon-like way of adapting to any particular set of observations." This is especially true when it comes to profiling. In *United States v. Sokolow*, 490 U.S. 1 (1989), Justice Marshall offered a string cite of cases in which a suspect matched one of the DEA's profiles to show that almost any behavior can be deemed suspicious and thus satisfy *Terry*'s reasonable suspicion requirement:

> Compare, e.g., United States v. Moore, 675 F.2d 802, 803 (C.A.6 1982) (suspect was first to deplane), with United States v. Mendenhall, 446 U.S. 544, 564 (1980) (last to deplane), with United States v. Buenaventura-Ariza, 615 F.2d 29, 31 (C.A.2 1980) (deplaned from middle); United States v. Sullivan, 625 F.3d 9, 12 (C.A.4 1980) (one-way tickets), with United States v. Craemer, 555 F.2d 594, 595 (C.A.6 1977) (round-trip tickets), with United States v. McCaleb, 552 F.2d 717, 720 (C.A.6 1977) (non-stop flight), with United States v. Sokolow, 808 F.2d 1366, 1370 (C.A.9 1987), vacated, 831 F.2d 1413 (C.A.9 1987) (changed planes); Creamer, supra, at 595 (no luggage), with United States v. Sanford, 658 F.2d 342, 343 (C.A.5 1981) (gym bag), with Sullivan, supra, at 12 (new suitcase); United States v. Smith, 574 F.2d 882, 883 (C.A.6 1978) (traveling alone), with United States v. Fry, 622 F.2d 1218, 1219 (C.A.5 1980) (traveling with companion); United States v. Andrews, 600 F.3d 563, 566 (C.A.6 1979) (acted nervously), with United States v. Himmelwright, 551 F.2d 991, 992 (C.A.5 1977) (acted too calmly).

Moreover, the concern raised in *Terry v. Ohio* that the costs of allowing stops and frisks based on reasonable suspicion would be disproportionately borne by racial minorities appears to have ample merit. Consider recent numbers from New York City, one of the few jurisdictions that require officers to make a record of certain stops and frisks. According to recent data analyzing 867,617 stops over a 2-year period, blacks and Hispanics constituted over 80 % of the individuals stopped, a percentage far greater than their representation in the population. Moreover, of the blacks stopped, 95 % were *not* found to be engaged in activity warranting arrest. When considered as a percentage of the population, the numbers are even more jarring. Stops of whites, if spread across the population of New York City,

would amount to stops of approximately 2.6 % of the white population during the period. By contrast, stops of blacks, if spread across the population, would amount to stops of approximately 21.1 % of the population.

The Seizure of Persons: Pretext Stops

Another seminal case in any discussion of the law of police seizures and the exercise of discretion is *Whren v. United States*, 517 U.S. 806 (1996), in which the Court rejected a Fourth Amendment challenge to a pretextual car stop used to search for drugs and other contraband. Justice Scalia, writing for the Court, rejected this argument and concluded that so long as the stop itself was based on an actual traffic violation, the subjective motivation of an officer in singling out a particular motorist, even if race-based, is irrelevant under the Fourth Amendment. Many scholars argue that *Whren* essentially green-lights the police practice of singling out individuals for pretextual traffic stops in the hope of discovering contraband. Given that most drivers routinely violate traffic laws, that is, by slightly exceeding the speed limit, *Whren* in fact gives officers almost unlimited discretion in deciding whom to target for a traffic stop.

Controversies

Like *Terry* before it, *Whren* has had racial consequences. Indeed, the terms "driving while black" and "driving while brown" have become part of the common lexicon to describe the belief that many officers consider race and ethnicity in determining whom to target for a traffic stop. Empirical evidence supports the belief that traffic enforcement disproportionately falls on racial minorities. For example, a report compiled by the Maryland State Police revealed that, during the period examined, African-Americans comprised 72.9 % of all of the drivers that were stopped and searched along a stretch of Interstate 95, even though they comprised only 17.5 % of the drivers violating traffic laws on the road.

Again, numbers like these are only part of the story. The other part is how these numbers impact law-abiding minority citizens. For example, in the Maryland study, even though blacks were disproportionately the subjects of searches, the hit rate for blacks, that is, the rate at which contraband was found, was statistically identical to the hit rates for whites. What this means in numbers is that the vast majority of the individuals stopped and searched were law-abiding minorities not in possession of contraband. A more recent analysis of over 810,000 "field data reports" collected by the Los Angeles Police Department found that the stop rate was 3,400 stops higher per 10,000 residents for blacks than for whites and 350 stops higher for Hispanics than for whites. There is also the issue of the discretionary practices that accompany such stops. The same study found police were 127 % more likely to search stopped blacks than to search stopped whites and 43 % more likely to search stopped Hispanics than stopped whites. Notwithstanding the fact that these groups were searched more often, blacks in fact were 37 % less likely to be found with weapons than searched whites and 24 % less likely to be found with drugs than searched whites. Similar numbers were found for searched Hispanics: Hispanics were 33 % less likely to be found with weapons than searched whites and 34 % less likely to be found with drugs than searched whites.

In addition to race, there is evidence that officers consider economic status in determining whom to target for a stop. For example, there is empirical evidence that police officers are significantly less likely to search vehicles driven by those with above-average incomes than vehicles driven by those with below-average incomes.

The Seizure of Persons: Non-seizures

Finally, any discussion of the law of police seizures would be incomplete without a discussion of a line of Supreme Court cases that categorize many police-citizen encounters as essentially "consensual," mere "encounters" that are not seizures and are thus outside the purview of the Fourth Amendment. In *United States v. Mendenhall*, 446 U.S. 544 (1980), and *Florida v. Bostick*, 501 U.S. 429 (1991), the Supreme Court held that

absent a show of force or other circumstances that would lead a reasonable person to believe he or she was not free to leave, a "stop" is not always a "stop" within the meaning of the Fourth Amendment. An officer need not have even reasonable suspicion to initiate an encounter. An officer surprising an individual, asking that individual to accompany the officer, and asking that individual a series of questions – *Where are you going? Do you live nearby? Are you visiting someone here?* – would likely be categorized as a consensual encounter, not a stop within the meaning of the Fourth Amendment. As the Supreme Court has interpreted the Fourth Amendment, "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage – provided they do not induce cooperation by coercive means." The facts in *Mendenhall* are illustrative. In *Mendenhall*, two federal agents approached an African-American woman in an airport, asked to see her identification and airline ticket, and asked her to accompany them to another location for further questioning, where they asked her if she would consent to a strip search. Justice Stewart, proposing the "free to leave" test for the first time, rejected her claim that she was ever "seized" within the meaning of the Fourth Amendment, reasoning that she was always free to leave, and as such the officers needed neither probable cause nor reasonable suspicion to engage her in what could be considered a "consensual encounter." The case of *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210 (1984), is also illustrative. *Delgado* involved a factory sweep to determine the presence of undocumented immigrants. Several INS agents positioned themselves near the buildings' exits, while others dispersed throughout the factory to question most of the workers. The agents "displayed badges, walkie-talkies, and were armed [as they] approached employees and, after identifying themselves, asked from one to three questions relating to their citizenship." Writing for the majority, Justice Rehnquist rejected any claim that the workers were in any way detained and categorized the encounters as entirely consensual and thus outside the purview of the Fourth Amendment.

As with *Terry* and *Whren*, the *Mendenhall* line of cases likely has race and class implications. Notably, all of the "free to leave" cases from the Supreme Court involved racial minorities. Unfortunately, there is little data about the pervasiveness of consensual encounters as a law enforcement tool, precisely because they are outside the purview of the Fourth Amendment. Turning again to New York's stop and frisk data, what this means is that the 867,617 stop and frisk reports tell us virtually nothing of the number of additional individuals who were questioned during supposedly "consensual encounters."

Related Entries

- ▶ Biased Policing
- ▶ Law of Police Searches
- ▶ Police Discretion and Its Control
- ▶ Police Legitimacy and Police Encounters

Recommended Reading and References

American Civil Liberties Union (2007) Analysis of new NYPD stop-and-frisk data. Available on-line at http://www.aclu.org/racialjustice/racialprofiling/33095prs20071126.html. 26 Nov 2007

Ayres I (2008) Racial profiling and the LAPD: a study of racially disparate outcomes in the Los Angeles Police Department. Available at http://www.aclu-sc.org/contents/view/3

Capers IB (2009) Policing, race, and place. Harv Civ Rights-Civ Liberties Law Rev 44:43

Capers IB (2011) Rethinking the fourth amendment: race, citizenship, and the equality principle. Harv Civ Rights-Civ Liberties Law Rev 46:1

Dressler J, Michaels AC (2006) Understanding criminal procedure, 4th edn. LexisNexis, New York, NY

Harris D (1997) 'Driving While Black' and all other traffic offenses: the Supreme Court and pretextual stops. J Crim Law Criminol 87:544

Maclin T (1990) The decline of the right of locomotion: the fourth amendment on the streets. Cornell Law Rev 75:128

Maclin T (1998) Race and the fourth amendment. Vanderbilt Law Rev 51:333

Law of Police Use of Force

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Overview

Perhaps no topic in policing has generated more debate than the use of force. In news coverage, as well as in movies and television dramas, police officers seem to confront violent offenders in lethal melee on a constant basis. Sometimes the stories concern allegations of excessive force or misconduct: the beating of Rodney King, the shooting of Amadou Diallo, the sexual assault of Abner Louima, the deadly FBI raid in Waco, the sniper fire in Ruby Ridge, and, most recently, the alleged rough treatment of Occupy Wall Street protestors. From these examples, people may extrapolate not only the incidence of official violence but also the law governing the use of force. This entry provides some background on the police use of force and a critical summary of the relevant law. The question remains as to whether the jurisprudence is sufficiently clear, consistent, and coherent in order to guide law enforcement, protect individual rights, and inform the citizenry of the legal boundaries.

Force, Police, and the Law

Definitions, Contexts, and Types of Force

For present purposes, the *use of force* may be defined as "any physical strike or instrumental contact with a person; any intentional attempted physical strike or instrumental contact that does not take effect; or any significant physical contact that restricts the movement of a person" (IACP, 116). Although some works on the topic provide a transnational perspective (Chevigny, 145–248), this entry focuses solely on the law of police use of force in the United States. The term *police* refers to any government agency empowered to enforce the criminal law of a given jurisdiction, including police departments, sheriff's offices, highway patrol, and the Federal Bureau of Investigation. The *law* of police use of force comprises the legal justifications and limitations for the use of force, as well as the remedies for the use of excessive force. The resulting framework addresses the issues of when the police may use force and what types of force may be used in terms of the amount of force and the method employed.

In general, the police use of force may be justified to prevent the commission of a crime, to implement the criminal justice process, or to preserve public order. Many jurisdictions and the American Law Institute's Model Penal Code specifically provide for the use of force in law enforcement (MPC, § 3.07). In certain contexts delineated by statute, police officers are said to possess a privilege to use force. As a constitutional matter, the police use of force is typically analyzed as a seizure of persons subject to the constraints of the Fourth Amendment. Over the years, the US Supreme Court has defined the term *seizure* in various ways. As used here, a seizure occurs when official force is intentionally applied to terminate or restrain an individual's freedom of movement (*Brendlin v. California*, 551 U.S. 249, 254 (2007)).

The rubric of crime prevention comprises the police use of force to protect persons and property. For instance, the US Supreme Court has held that a police officer may temporarily detain an individual based on a reasonable suspicion that "criminal activity may be afoot" (*Terry v. Ohio*, 392 U.S. 1, 50 (1968)). If the officer also reasonably suspects that the individual is armed and dangerous, he may conduct a frisk for weapons to ensure his own safety and the security of others. Recently, the Supreme Court upheld the use of force to detain occupants during a home search due to "the risk of harm to both officers and occupants" (*Muehler v. Mena*, 544 U.S. 93, 100 (2005)).

The use of force to effect an arrest or otherwise seize a suspected criminal is the most obvious example of force employed to implement the legal process. Law enforcement may conduct an

arrest – that is, taking an individual into custody to answer for a criminal charge – based on "probable cause," which is defined as sufficient facts and circumstances to warrant an officer of reasonable caution to believe that a crime has been committed and the person to be arrested committed it (*Brinegar v. United States*, 338 U.S. 160, 175–76 (1949)). Likewise, the police may use force to prevent the escape of a suspected criminal or to prevent the destruction of evidence. As for preserving public order, the paradigmatic example is the police use of force to suppress a riot after the rioters have been ordered to disperse and warned that force will be used if they do not obey.

Traditionally, the police use of force has been divided into two categories: *deadly force* (or lethal force) and *non-deadly force* (or nonlethal or less-lethal force). Deadly force is commonly defined as force that is likely to cause death or serious physical injury. Most prominently, this category encompasses discharging firearms at other individuals. But it also includes, for instance, the use of a police cruiser against another occupied vehicle, as when law enforcement performs a "Precision Intervention Technique" (PIT) maneuver – hitting another vehicle with the goal of causing it to spin to a stop. Nondeadly force comprises the use of all other types of force, including physical contact (e.g., tackling and punching), restraining devices (e.g., handcuffs), impact weapons (e.g., batons and flashlights), chemical weapons (e.g., pepper spray and mace), electronic weapons (e.g., stun guns), kinetic energy weapons (e.g., beanbag guns), explosive devices (e.g., flash-bang grenades), and police dogs.

Constitutional Limitations on Police Use of Force

At common law, government agents and private citizens were allowed to use both lethal and nonlethal force to apprehend a felon or prevent the commission of a felony. Nonlethal force could be used to prevent the commission of a misdemeanor amounting to a breach of the peace, but force could not be used to prevent the commission of any other misdemeanor. These standards were carried over to the American colonies and subsequently adopted in judicial opinions or codified by statute in the post-revolutionary states. Certainly, the common-law rules made some sense in an era when all felonies were punishable by death and private citizens often served as the community's law enforcers, dutifully answering the "hue and cry" to help apprehend criminals (Perkins & Boyce, § 10.1).

In modern times, however, this justification was undermined by the near monopoly of force exercised by the police, the proliferation of felony offenses in penal codes, and the reservation of capital punishment for the crime of murder. Nonetheless, some states maintained the so-called "fleeing felon" rule of the common law, which allowed the police to use whatever force was necessary, including deadly force, to prevent the escape of a felon. In its 1985 decision in *Tennessee v. Garner*, the US Supreme Court found that applications of this rule could violate the Fourth Amendment's ban on unreasonable seizures. "It is not better that all felony suspects die than that they escape," the Court opined, declaring that a "police officer may not seize an unarmed, nondangerous suspect by shooting him dead" (*Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). The *Garner* Court then announced a constitutional standard for the use of deadly force:

> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." (*ibid*., 11–12)

Subsequent decisions have both expanded upon *Garner* and limited its categorical prohibition on deadly force to the basic fact pattern presented by the case. In 1989, the Supreme Court in *Graham v. Connor* made clear that excessive force claims arising from arrests, investigatory stops, and other seizures are

properly characterized as invocations of the Fourth Amendment. Other constitutional provisions apply to individuals already in lawful custody, with pretrial detainees and convicted prisoners protected from excessive force by the Due Process Clause and the Eighth Amendment, respectively. Most importantly, the *Graham* Court held that all Fourth Amendment claims of excessive force, both deadly and non-deadly, should be evaluated for "reasonableness." This standard balances the nature and quality of the police intrusion against the governmental interests at stake, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight" (*Graham v. Connor*, 490 U.S. 386, 396 (1989)).

The *Graham* Court emphasized that the evaluation must not employ the "20/20 vision of hindsight." Instead, the proper perspective is that of a reasonable officer who is on the scene and may be "forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation" (*ibid*., 396–97). Moreover, the inquiry is one of "objective reasonableness," that is, whether the use of force was reasonable in light of the facts and circumstances confronting the police officer but without regard to his underlying intent or motive. An officer's corrupt intentions, even those that are "malicious and sadistic," do not transform an objectively reasonable use of force into a Fourth Amendment violation, just as an officer's good intentions do not render constitutional an objectively unreasonable use of force.

Most recently, the Supreme Court's decision in *Scott v. Harris* considered a specific fact pattern involving the use of police vehicles to seize a fleeing motorist. Although the use of a police cruiser to ram the motorist's vehicle did amount to deadly force, the Court rejected the idea that its earlier decision in *Garner* established "a magical on/off switch" (*Scott v. Harris*, 550 U.S. 372, 382 (2007)). The ultimate test is not whether the police used deadly force but whether the use of such force was objectively reasonable under the circumstances. In terms of the danger to others, the present case was quite unlike the escape on foot of an unarmed felony suspect in *Garner*. Pointing to a videotape of the chase, the *Scott* Court weighed the risks of the PIT maneuver versus the fleeing motorist's endangerment of pedestrians, other civilian motorists, and officers involved in the chase. According to the Court, the test of reasonableness can take into consideration the number of people imperiled by the fleeing motorist, as well as the relative culpability of that motorist versus those he placed in harm's way.

Means of Evaluating the Police Use of Force

In theory, the police use of force might be assessed through a number of legal paths. For instance, statutory schemes and departmental regulations on the use of force might be challenged on their face as constitutionally unreasonable. However, this option is largely foreclosed by legal and practical barriers to bringing facial challenges under the Fourth Amendment (*Sibron v. New York*, 392 U.S. 40, 59–60 (1968)), which might explain the persistence of statutes of dubious constitutionality in light of *Garner* (McCauley and Claus, 3). Moreover, the internal rules of an executive agency are often non-justiciable (*United States v. Caceres*, 440 U.S. 741 (1979)).

Another option would be to evaluate the police use of force in criminal proceedings. Defendants claiming to be victims of excessive force might seek, inter alia, the suppression of incriminating evidence at trial. But the courts have refused to apply the exclusionary rule absent a causal connection between the excessive force alleged by the defendant and the evidence he seeks to suppress (*United States v. Watson*, 558 F.3d 701 (7th Cir. 2009)). State prosecutors can bring charges against police officers whose use of force constitutes a criminal offense, and federal prosecutors can indict officers for uses of force that amount to deprivations of constitutional rights (18 U.S.C. § 242). Although beyond the scope of this entry, various legal requirements and practical impediments limit the viability of criminal prosecutions as a method to assess

the use of force and check police abuses (Harris, 55–64).

Instead, civil suits have proven to be the most feasible means to contest the use of force. Purported victims of excessive force can bring state tort law actions against offending police officers, although claims based on simple negligence may be barred by sovereign immunity for the discretionary acts of government officials made in the course of duty. Alternatively, a 1994 federal law empowers the US Department of Justice to investigate and bring suit against police departments that have a "pattern or practice" of conduct violating the civil rights of people within their jurisdictions (42 U.S.C. § 14141). Since its enactment, the law has been used to investigate dozens of police departments, including those exhibiting patterns of excessive force. Typically, the cases result in a settlement where the department in question agrees to implement a slate of reforms. However, the law is not designed to investigate a specific case or to institute a civil action for a particular use of force.

Today, most use of force litigation is brought in federal court under a provision of the Civil Rights Act of 1871 (42 U.S.C. § 1983) which imposes liability on persons who, while acting under color of law, deprive others of their civil rights. Section 1983 itself is not a source of rights but instead provides a cause of action to vindicate established federal rights. As discussed, the relevant right in excessive force cases is the Fourth Amendment prohibition against unreasonable seizures. Although § 1983 only applies to state officials, the Supreme Court has ruled that an implied cause of action exists against federal officials for civil rights violations (*Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)).

Before trial, § 1983 cases can be stymied, or at least complicated, by the threshold issue of qualified immunity. This doctrine shields government officials from liability so long as his or her conduct does not violate clearly established rights that would have been known to a reasonable officer. The US Supreme Court has held that the first step in qualified immunity analysis is determining whether the police officer's conduct violated a constitutional right. At times, "a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established," which, in turn, "serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable" (*Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

Over the past half century, thousands of federal lawsuits have raised claims of excessive force under § 1983, thereby providing the principal means for shaping the law of police use of force (Harmon, 1126). Indeed, *Garner*, *Graham*, and *Scott* were all cases brought under this provision. A number of reasons help explain the dominance § 1983 litigation, including the potential for successful plaintiffs to obtain attorney fees and costs (which, somewhat ironically, can be greater than the damages awarded to plaintiffs), as well as the fact that federal cases tend to come to trial much faster than state cases.

Controversies

The Supreme Court opinions on the use of force are often "cast at a high level of generality" and "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application" (*Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)). Or as one federal judge put it, "There is no such thing as a per se violation of the Fourth Amendment" (*Cox v. Treadway*, 75 F.3d 230, 241 (6th Cir. 1996) (Ryan, J., concurring in part)). However, the idea that there are no per se rules in this area is belied by the fact that *Garner* did, in fact, adopt a bright-line rule regarding the use of lethal force. The same can be said of *Scott*, despite claims to the contrary in the majority opinion. Specifically, the *Scott* Court delivered the following conclusion: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death" (*Scott*, 550 U.S. at 386). This rule may be "sensible," as the *Scott* Court believed, but it certainly appears to be "absolute" (*ibid.*, 389 (Breyer, J., concurring)).

Objections to a per se approach might be tempered by reading *Scott* as creating a special rule regarding deadly force, as some lower court opinions have done with *Garner* (*Quintanilla v. City of Downey*, 84 F.3d 353, 357 (9th Cir.1996)). Yet the distinction between deadly and non-deadly force is not always clear. For instance, striking an individual in the head with a baton or other hard object may properly be viewed as deadly force, and some police departments classify the use of chokeholds and the firing of warning shots as deadly force. Moreover, the use of ostensibly non-deadly instruments can still produce lethal consequences, such as when a flash-bang grenade – an explosive device that creates a disorienting light and sound – ignites flammable accelerants contained in a building. Rather than relying solely on the Supreme Court's rough dichotomy between deadly and non-deadly force, most law enforcement agencies employ far more discerning methodologies to guide their officers. For instance, use-of-force continuums incorporate multiple levels of force, which typically begin with officer presence and verbal communication and end with the use of deadly force.

The totality of the circumstances approach espoused by *Graham* presents its own difficulties. As then-Judge (now-Stanford Law Professor) Michael McConnell opined: "[B]ecause excessive force jurisprudence requires an all-things-considered inquiry with 'careful attention to the facts and circumstances of each particular case,' there will almost never be a previously published opinion involving exactly the same circumstances" (*Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) (quoting *Graham*)). To reiterate, the Supreme Court in *Graham* listed three non-exclusive factors that may be relevant when considering the objective reasonableness of police use of force: the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. In *Scott*, the Court referenced the number of people endangered by the suspect and the relative culpability of that suspect versus those he placed in harm's way. The lower courts have cited additional considerations in assessing reasonableness, including:

- the type and amount of force used by the police
- the extent of injuries inflicted upon the suspect
- the amount of time and any changing circumstances during which the officer had to determine the type and amount of force that appeared necessary
- the relative physical characteristics of the officer and the suspect (e.g., height, weight, age, gender, and strength)
- the nature of the arrest charges
- the availability of alternative methods of capturing or subduing the suspect
- whether a warrant was used
- whether the suspect resisted or was armed
- whether more than one suspect or officer was involved
- whether a warning was given before the use of force
- whether the suspect was sober
- whether it was apparent that the suspect was emotionally disturbed
- whether the officer harbored ill will toward the suspect

Any number of other circumstances might be added to this list, either explicitly or by use of a catch-all phrase, such as "whether other dangerous or exigent circumstances existed at the time of the arrest" (*Chew v. Gates*, 27 F.3d 1432, 1440 n.5 (9th Cir. 1994)). Without constraints on the relevant circumstances or at least some guidance as to the hierarchy or relative weight of factors, the reasonableness standard can have the semblance of a Rorschach test. Along these lines, Professor Rachel Harmon has argued that "the reasoning in these cases is ad hoc, often inconsistent, and sometimes ill-considered," meaning that "the outcomes of future cases are largely unpredictable, even by the Supreme Court's own measures" (Harmon, 1123).

As noted above, some cases have taken into consideration the type and amount of force used and the availability of alternative methods of capturing or subduing a suspect. Other cases, however, have held that police officers need not

use the least intrusive means of responding to an exigent situation (*Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994)). Likewise, officers are not required to use, and their departments are not required to provide, particular types of weapons (*Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994)). And as a matter of law, officers might not have a duty to retreat before using deadly force (*Penley v. Eslinger*, 605 F.3d 843, 855 (11th Cir. 2010)). Although several cases emphasized the communication of warnings before using force, other cases have found it objectively reasonable for an officer to forego a warning (*Colston v. Barnhart*, 102 F.3d 85 (3d Cir. 1997)). More generally, the police are not required to make any announcement when carrying out an arrest in a public place (*Catlin v. City of Wheaton*, 574 F.3d 361 (7th Cir. 2009)).

Another subject of debate in excessive force cases relates to the level of force used and the kind of injury inflicted. In passing, the *Graham* Court stated that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment" (*Graham v. Connor*, 490 U.S. 386, 397 (1989)). Along these lines, some courts have held that a Fourth Amendment violation only occurs when the police use more than a de minimis amount of force (*Cook v. City of Bella Villa*, 582 F.3d 840 (5th Cir. 2009)) and that the suspect must suffer an actual or non-de minimis injury (*Fisher v. City of Las Cruces*, 584 F.3d 888 (10th Cir. 2009)). But other courts have held that excessive force claims do not require more than a de minimis injury ((*Chambers v. Pennycook*, 641 F.3d 898 (8th Cir. 2011)), which is consistent with the Supreme Court's jurisprudence on inmate claims of excessive force under the Eighth Amendment (*Wilkins v. Gaddy*, 130 S. Ct. 1175 (2010)).

Additional areas of tension in the case law include the significance of verbal or physical threats by the police, particularly in the absence of physical injury; the pertinence of an officer's ill will toward a suspect in a regime premised on objective reasonableness; and the relevance of department policies given that a violation of such policies is not a basis for an excessive force claim. But perhaps the most glaring inconsistency in the jurisprudence, and the clearest split among the federal circuit courts, concerns the appropriate time frame for analyzing the reasonableness of police use of force (Avery, 267–89). Some decisions have focused on the Supreme Court's language of "immediate flight," "on the scene," "reasonableness at the moment," and "split-second judgments," all of which connote short time spans and temporal proximity (*Graham v. Connor*, 490 U.S. 386, 396 (1989)).

With these phrases in mind, the Second, Fourth, Fifth, Eighth, and Eleventh Circuits have limited the assessment to those circumstances existing at the time of the seizure. For instance, the Second Circuit concluded that an officer's

> "actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force. The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force." (*Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996))

By contrast, the First, Third, Ninth, and Tenth Circuits have held that proper analysis of excessive force claims must take into consideration the actions leading up to a seizure. In rejecting decisions espousing a narrow time frame, the Third Circuit could

> "not see how these cases can reconcile the Supreme Court's rule requiring examination of the 'totality of the circumstances' with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished. 'Totality' is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force." (*Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999))

Still another approach has been employed by the Sixth and Seventh Circuits, which divide use of force incidents into separate, sequential parts for analysis. As explained by the Seventh Circuit, "we carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage," but without returning to prior segments to reconsider the event "in light of hindsight" (*Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994)).

Conclusion

Given the above, it is not surprising that scholars have criticized the current law of police use of force. Professor Harmon has described the Supreme Court's jurisprudence as "profoundly impoverished," with the "paucity of reasoned analysis in this area" undermining "the evolution of a principled case law defining clear requirements for the legitimate use of police force" (Harmon, 1119, 1183). Another commentator claims that "[a]s brutality remains a problem and law enforcement challenges continue to grow, there has never been a better time to add flesh to the skeletal understandings of force found in the text of the Fourth Amendment" (Note, 2009, 1721–22). Arguably, the problem is not just the quantity of law on the use of force or the appropriate choice (or mix) of bright-line rules and flexible standards. Rather, there appears to be a disconnect between the case law on the one hand and people's perceptions on the other.

Consider, for example, the "added wrinkle" in the Supreme Court's decision in *Scott v. Harris*: "existence in the record of a videotape capturing the events in question" (*Scott v. Harris*, 550 U.S. 372, 378 (2007)). Based on its review of the tape, the *Scott* Court concluded that the fleeing motorist's "version of events is so utterly discredited by the record that no reasonable jury could have believed him," deriding the lower courts for having "relied on such visible fiction" when "it should have viewed the facts in the light depicted by the videotape" (*ibid.*, 380–81). In dissent, Justice John Paul Stevens believed that "the tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue" (*ibid.*, 389–90 (Stevens, J., dissenting)). Along the way, Justice Stevens panned "eight of the jurors on this Court" for reaching a different verdict than the lower court judges, "who are surely more familiar with the hazards of driving on Georgia roads than we are" (*ibid.*, 390). Nonetheless, the majority was "happy to allow the videotape to speak for itself" (*ibid.*, 378 n.5 (majority opinion)). Since *Scott*, the lower courts appear to have taken the cue, relying on videotapes in ruling on summary judgment motions in use of force cases (*Dunn v. Matatall*, 549 F.3d 348 (6th Cir. 2008)).

As it turns out, however, "what [a videotape] says depends on to whom it is speaking," as demonstrated by an empirical study conducted by Professors Dan Kahan, David Hoffman, and Donald Braman. The video in *Scott* was shown to a diverse sample of more than 1,300 Americans, who were then asked to describe what they saw and to provide their opinions on key issues identified by the Supreme Court. The authors found that a substantial majority of study participants had viewpoints consistent with those expressed by the eight-member majority of the Supreme Court. This perspective was hardly uniform, however. "Whites and African Americans, high-wage earners and low-wage earners, Northeasterners and Southerners and Westerners, liberals and conservatives, Republicans and Democrats – all varied significantly in their perceptions of the risk that [the fleeing motorist] posed, of the risk the police created by deciding to pursue him, and of the need to use deadly force against [the motorist] in the interest of reducing public risk" (Kahan et al., 903). As such, the vice of *Scott* was not necessarily the outcome but the way in which the Court reached it, namely, by asserting that no reasonable jury could have come to a different conclusion regarding the reasonableness of the police use of force.

The authors suggested several alternative rationales – for instance, the need for uniform, predictable rules – by which the *Scott* Court could have rendered the same judgment without dismissing other coherent viewpoints as unreasonable. To these suggestions, one might add the larger project identified by Professor Harmon: the need for "an accessible and transparent framework that the public may use to analyze highly publicized uses of police force" (Harmon, 1183). It may well be true that only a small percentage of police-citizen contacts involve the use of physical force (Adams et al., 3). But as mentioned at the beginning of this entry, the use of force tends to be understood through the lens of mass-media portrayals, which can distort popular perceptions or at least focus attention on extreme circumstances, at times fostering distrust of the police

and disrespect for the legal system (Luna, 1112–19). Finding the means to educate the citizenry about the jurisprudence of force and to inform legal decision-makers about perceptions of police-citizen interactions might provide the first step toward an understanding of the police use of force that goes beyond the "Hollywood-style car chase of the most frightening sort" (*Scott v. Harris*, 550 U.S. 372, 379 (2007)).

Related Entries

- ▶ Law of Police Seizures and the Exercise of Discretion
- ▶ Legal Control of the Police
- ▶ Police and the Excessive Use of Force
- ▶ Police Use of Firearms

Recommended Reading and References

American Law Institute (1962) Model Penal Code: official draft and explanatory notes (MPC). American Law Institute, Philadelphia

Adams K et al (1999) Use of force by police: overview of national and local data. U.S. Dept. of Justice, Washington, DC

Avery M (2003) Unreasonable seizures of unreasonable people: defining the totality of circumstances relevant to assessing the police use of force against emotionally disturbed people. Columbia Hum Rights Law Rev 34(2):261

Avery M, Rudovsky D, Blum KM (1996) Police misconduct: law and litigation. Clark Boardman Callaghan, New York

Chevigny P (1995) Edge of the knife: police violence in the Americas. The New Press, New York

Civil Rights Division, U.S. Department of Justice, Conduct of law enforcement agencies. http://www.usdoj.gov/crt/split/police.php

Harmon RA (2008) When is police violence justified? Nw UL Rev 102(3):1119–1187

Harris D (2012) The interaction and relationship between prosecutors and police officers in the United States, and how this affects police reform efforts. In: Luna E, Wade M (eds) The prosecutor in transnational perspective. Oxford University Press, New York

International Association of Chiefs of Police (IACP) (2006) Protecting civil rights: a leadership guide for state, local, and tribal law enforcement. U.S. Dept. of Justice, Washington, DC

Luna E (2000) Transparent policing. Iowa Law Rev 85(4):1107–1194

Kahan DM, Hoffman DA, Braman D (2009) Whose eyes are you going to believe? *Scott v. Harris* and the perils of cognitive illiberalism. Harv Law Rev 122(3):837–906

McCauley RP, Claus LN (2007) Police use of force statutes: states inconsistent with established constitutional law. Crim L Bull 43(5):726–738

Note (2009) Retreat: the Supreme Court and the new police. Harv Law Rev 122(6):1706–1727

Law of Undercover Policing

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Synonyms

Covert policing; Infiltration; Sting operations

Overview

Undercover policing is an investigative technique that is largely unregulated by constitutional criminal procedure in the United States, though the European Court of Human Rights has proven more willing to regulate the impact of undercover tactics on fundamental rights. American criminal law regulates undercover policing primarily through the entrapment defense, of which there are different variants. Current tests rest on empirical assumptions about the ways in which police investigations influence their target environment. Current versions of the entrapment defense do not take account of the varieties of undercover investigations and the different types of influences undercover agents may exert on their targets.

Key Issues and Controversies Surrounding the Choice of Regulatory Framework

Undercover policing is proactive an investigative tactic that allows police officers and informants

to infiltrate criminal organizations or to test the criminal resolve of suspected offenders by disguising their true identities and orchestrating criminal opportunities. Undercover tactics have been examined through a rich variety of regulatory prisms, each of which captures a different feature that makes such operations vulnerable to abuse. Criminal law scholars worry about entrapment, which is an affirmative defense for targets of undercover stings who can show that government agents convinced them to commit a crime when they were not predisposed to engage in such criminal activity. Criminal law scholars also consider the potential criminal liability of undercover agents and informants who participate in the crimes they investigate. Criminal procedure scholars examine the impact of undercover investigations on the constitutional rights of criminal defendants, including their legitimate expectations of privacy under the Fourth Amendment and the ways in which undercover operations can compromise the privilege against compelled self-incrimination under the Fifth Amendment and the Sixth Amendment right to counsel.

Many civil libertarians look beyond the rights of criminal defendants to the First and Fourth Amendment interests of ordinary citizens. These concerns center on covert operations that pursue intelligence rather than evidence, since such investigations are likely to affect not only criminals but anyone who belongs to religious and political organizations that the government seeks to infiltrate. Because such investigations may not be predicated on concrete suspicion of wrongdoing, they may cast a wider net, yielding information whose validity may never be tested in court; covert scrutiny of this sort may burden the exercise of freedom of speech, assembly, and religion and may compromise the privacy of confidential communications between members of targeted organizations. Finally, state bar associations and courts that interpret state ethics codes have from time to time become concerned that prosecutors who supervise undercover operations might infringe disciplinary rules that prohibit attorneys from sanctioning acts of deception, or from sponsoring direct or indirect contact with represented parties, outside the presence of their lawyers.

Among this multiplicity of regulatory options, the entrapment defense remains the most significant, if only because most of the other types of challenges have proven either legally ineffectual or limited in scope. Appeals to civil liberties, in particular, have been notably less successful in the United States than in the European Union, where the European Court of Human Rights (ECtHR) has interpreted the Convention on Human Rights (ECHR) to protect the fair trial rights of criminal defendants whose convictions rest on evidence obtained undercover. Within the European Union, many national legislatures have understood the Convention's protections for privacy (set forth in Article Eight) as requiring statutory regulation of undercover operations and the enactment of a warrant procedure that ensures prior approval and continuing oversight by judicial officers. The Convention's privacy protections have been interpreted to limit the use of undercover tactics primarily to the pursuit of serious crimes, after showing that other, less intrusive investigative tactics seem unlikely to yield evidence against highly secretive offender groups. Accordingly, European legal systems authorize undercover operations primarily for the investigation of organized crime. Statutory constraints limit both the types of crimes undercover agents can investigate and the tactics they can use, as undercover agents in many European countries risk criminal sanctions for facilitating or taking part in crimes for which undercover tactics are not authorized by law – even when such assistance or participation serves exclusively investigative purposes. The European Court of Human Rights has also sustained challenges to undercover operations on grounds of entrapment, or because of the use of secret evidence, without adequate opportunity to question undercover agents and informants at trial. Both types of challenges invoked the right to a fair trial, as guaranteed by Article Six of the ECHR.

By contrast, undercover operations in the United States are not authorized by statute and may be initiated without obtaining a warrant or establishing probable cause or even reasonable suspicion that a crime is being committed. In *Hoffa v. United States*, 385 U.S. 293 (1966),

the Supreme Court held that the use of undercover agents and informants does not tantamount to a search, within the meaning of Fourth Amendment, as targets waive their expectations of privacy in the information they voluntarily impart to others; in essence, suspects assume the risk of betrayal by their associates, or the risk that those with whom they commit crimes may turn out to be undercover agents. While listening in on a target's telephone conversation is a search that infringes on a protected expectation of privacy, eliciting such a target's confidences through undercover agents or informants does not count as a search within the meaning of the Fourth Amendment. Accordingly, resort to undercover tactics, unlike the use of electronic surveillance, requires no showing that less intrusive investigative methods have been tried or are likely to fail and no showing that the crimes being investigated are sufficiently serious to warrant the use of the undercover technique. In *Illinois v. Perkins*, 496 U.S. 292 (1990), the Supreme Court also rejected claims that undercover questioning of a custodial defendant violates his Fifth Amendment right to silence, even if he has already indicated his unwillingness to speak to the police, because the Fifth Amendment protects defendants only from compelled self-incrimination; if the defendant does not realize he is speaking to a representative of the police, the Court has reasoned, he cannot experience the conversation as an exertion of pressure by the government. Defendants have had more success challenging undercover questioning of defendants who have invoked their right to counsel. In *Massiah v. United States*, 377 U.S. 201 (1964), the Supreme Court held that once formal charges are in place, undercover questioning can violate a criminal defendant's Sixth Amendment right to counsel – but only if the questioning concerns the crimes with which he is charged and only if he has already invoked his right to counsel. Finally, sufficiently outrageous sting operations can violate defendants' substantive Due Process rights under the Fifth and Fourteenth Amendments. But this remains largely a theoretical possibility, as very few convictions have been vacated on that basis.

In recent years, US courts have also rebuffed claims that undercover policing invades their First Amendment rights of freedom of speech and assembly, though similar claims made in the 1970s and 1980s resulted in consent decrees under the terms of which police departments for cities like New York and Chicago agreed to refrain from surveillance of political and religious organizations absent any concrete evidence of ongoing or incipient criminal conduct. These consent decrees were quietly abandoned in the wake of the September 11 attacks, and the FBI, too, has modified the internal guidelines that restricted domestic intelligence agencies absent evidence of a criminal threat.

If American courts have rarely sustained legal challenges that are framed in the language of rights, and if American legislatures have never enacted a statutory warrant requirement, they have also avoided the regulatory path taken by most European legal systems before undercover tactics came to be regulated by a statutory warrant requirement: that of restraining undercover tactics through the threat of criminal sanctions for undercover agents or informants who take part in the crimes they investigate. Courts have taken the position that "[c]riminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law" (*Brogan v. United States*, 522 U.S. 398 (1998)). And state legislatures have enacted broad immunities for undercover agents, through the so-called "public authority" defense, which protects law enforcement officers generally from criminal liability for enforcement actions that were duly authorized by their superiors. Unlike French and Italian immunities, which spell out the undercover tactics in which undercover agents and informants may lawfully engage, the American defense makes no effort to enumerate the enforcement actions – undercover or otherwise – for which the defense is designed.

The Dominant Framework: Entrapment

Accordingly, the entrapment defense remains the primary regulatory constraint on the criteria by which targets of undercover operations are

selected and on the ways in which undercover investigations are planned and carried out. But there is an ambiguity at the heart of the entrapment defense, which accounts for the divergent ways in which it has been codified and discussed. Does the rationale for the defense rest on the view that targets do not deserve to be punished if they would have been unlikely to commit the charged offense without the criminal opportunity they were offered by government? Or does the entrapment defense exist primarily to reorient investigators away from targets of opportunity to "real" criminals, to whom the government merely tenders a convenient occasion to commit acts in which they would otherwise engage undetected?

The so-called objective test accords with the latter rationale, as it concerns itself with the nature and strength of the inducement employed by the government instead of the predisposition of offenders. While a particular defendant may well have been predisposed to commit the crime with which he is charged, an excessively appealing inducement may nonetheless amount to entrapment if it has a tendency to overcome the resistance of the average law-abiding citizen. Only a minority of jurisdictions, such as California and Oregon, have embraced this version of the entrapment defense. By contrast, the subjective variant of the entrapment defense accords with the former rationale, as it makes the defense available only to those offenders who were not predisposed to commit the crime they were eventually encouraged or persuaded to commit. A third, hybrid variant makes the defense available only if the defendant can establish both that he was not predisposed to commit the crime *and* that the government's tactics were unfair, meaning that the pressures and inducements it used were excessive. This is the most restrictive variant of the entrapment defense, as a purely subjective test would sustain a defense of entrapment even when the government offered a target otherwise reasonable inducements, so long as the targeted offender could establish a lack of predisposition.

In *Sherman v. United States*, 356 U.S. 369, 372 (1958), the Supreme Court embraced this hybrid version of the test by asking whether the inducement was objectively excessive and whether the government's tactics in fact implanted the idea for the crime in the mind of an "unwary innocent," reasoning that the legislature that defined the criminal offense could not have intended the criminal prohibition to apply to those who would not have committed such a crime without encouragement by undercover agents or informants. Critics of the subjective entrapment defense and its hybrid variant have pointed out that any claim that targets who lack predisposition do not deserve criminal punishment must explain the unavailability of any similar defense to those "unwary innocents" who were led astray by their friends rather than government agents or informants.

Critics of all three variants of the entrapment defense point out that all current versions of the test make the assumption that one can meaningfully distinguish "true criminals" from "unwary innocents." Commentators argue that almost anyone can be induced to commit a crime if the "criminal offer" is sufficiently tempting, so that the distinction between deserving and undeserving targets is at best a fluid one. The true question, for many reformers, is what level of inducement is considered reasonable, with some commentators using a market framework to argue that so-called above-market offers should be prohibited, because they may ensnare at least some targets who would be unlikely to commit crimes under "normal market conditions," meaning that they would be unlikely to take advantage of the ordinary of criminal opportunities they are likely to encounter in their normal surroundings.

Legal scholars who would prohibit the government from offering targets more than the "market price" as inducements to commit a crime have often been vague about what constitutes an excessive inducement, as they have generally not examined or systematized the variety of government sting operations that might give rise to a defense of entrapment. In the realm of sociology, however, Gary Marx's path breaking study, *Undercover: Police Surveillance in America* (1988), has identified a wide range of ways in which infiltration can alter

a target's conduct or environment, along with a large number of factors that can distort the "naturalism" of an undercover operation. Marx points out that undercover operations can alter not only the opportunity structure for criminal conduct but also the motives, rewards, markets, or resources that shape targets' decisions about whether to offend and how. And among types of undercover operations, those in which an operative investigates past crimes are less likely to shape criminal conduct than anticipatory investigations that seek to prevent or facilitate future offenses. Investigations that offer criminal opportunities randomly will pose different risks of abuse than sting operations undertaken in response to prior intelligence about specific targets. Even if efforts to avoid concerns about entrapment lead investigators to emulate the natural criminal environment in their design of a criminal opportunity, too much realism may also overbear a target's autonomy, since "[i]n genuine criminal encounters, one party may coerce or threaten another party into participating" or may offer sex or drugs as an inducement.

Applicability of Entrapment Defense to the Varieties of Undercover Policing

The distortions that can be created by undercover operations may be compared to those inherent in either cognitive science or anthropology. In cognitive science, an experimental design may not correlate well with the real-life setting it seeks to emulate, if the experimental scenario is overly artificial. In the same way, an undercover agent may, perhaps unwittingly, offer a target a criminal opportunity that may be a poor substitute, or proxy, for the types of offenses that a target commits on his own, independently of the government. This may be a particularly salient risk for transactional undercover investigations, in which the undercover agent may agree to buy a much larger quantity of contraband from a suspected dealer than the target ordinarily sells to others. (American courts call this phenomenon "sentencing entrapment," if the investigator's aim is to increase the level of offending for the purpose of triggering a mandatory minimum prison term, or some other sentence enhancement.)

But some undercover investigations may more profitably be compared to ethnography, anthropology, or undercover sociology rather than the experimental designs of cognitive science. If an undercover agent infiltrates a criminal organization, learning about kinship patterns and power hierarchies, his presence as a facilitator or coconspirator can reshape some of the internal dynamics of the organization or help the organization to branch out into new territories or to take advantage of emerging criminal opportunities. In this, agents may resemble anthropologists, ethnographers, or sociologists, who become part of a community they are studying, and in the process may influence and alter the social environment, for example, by bringing with them weapons and tools that lead natives to abandon their own technologies or by helping native communities patent their knowledge of the therapeutic effects of local plants and herbs. If undercover agents participate in the organization's crimes, instead of proffering criminal opportunities that the government can control, the agents may not only help reshuffle established hierarchies but may shape at least some of the organization's criminal activities. Agents may also become entangled with and perhaps complicitous in the commission of crimes against innocent third parties or in retaliatory violence against unwitting informants (who may vouch for undercover agents without knowing their true identity.)

Most American undercover investigations can be grouped along a continuum, one end of which resembles the artificial, experimental scenarios through which cognitive scientists seek to reproduce natural occurrences under controlled conditions, while the other end of the spectrum features true infiltration of a natural environment which may, however, be altered by the presence of an outside observer. If undercover narcotics buys are closest to controlled experiments, other analogues to cognitive science experiments include the whole range of "honeypot" operations in which the police offer a criminal opportunity to

targets who self-select by taking agents up on their criminal offers. Such investigations include random integrity testing of bank tellers, the establishment of storefront fencing operations, the positioning of bait cars filled with tempting merchandise, or the deployment of decoy officers posing as prostitutes on the street or as underage girls on the Internet. At the other end of the spectrum, undercover agents, sociologists, and journalists have infiltrated mental hospitals, supermarket chains, and extremist political parties, much as long-term moles have infiltrated the Cosa Nostra, the Hell's Angels, and the Klu Klux Klan.

To be sure, all undercover operations allow the government secretly to influence the crimes it investigates. But the concerns such influence might raise will be different when the government orchestrates an offense as a provable proxy for other, secret criminal activity, than when it allows its agents to take part in and perhaps even steer offenses that are orchestrated by others, in settings and with consequences that the government may either not be able to control or may be able to steer only at the cost of making the organization's true ambitions and capabilities difficult to disentangle from the government's own contribution.

Neither objective nor subjective tests for entrapment are currently able to distinguish among these types of influence in assessing targets' criminal responsibility for crimes to which government operatives contribute in an undercover capacity. That the entrapment doctrine functions as an affirmative defense makes it difficult to treat government influences as a matter of degree. By contrast, Italy and Germany treat entrapment as a scalar concept by making the doctrine available as a mitigating factor at sentencing. (The American doctrine of sentencing entrapment is rarely successful in reducing punishment to reflect government influence on the severity of a target's offense, as it is invoked only in truly exceptional cases.) This allows targets' penalties to be adjusted for the degree of government influence on targets' criminal activities, so that punishment may correspond to the nature and severity of the offenses that targets would have committed on their own. Compared with many of the member states of the European Union, the United States remains unusual in resisting both statutory regulation and warrant requirements, which would compel advance scrutiny of undercover operations, while making much less use of doctrines such as sentencing entrapment to adjust for distorting government influences in their aftermath.

Related Entries

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- ▶ Risk Management in Policing
- ▶ Sex Offenders and Criminal Policy
- ▶ Victims and the Police

Recommended Reading and References

Deis JG (2001) Economics, causation, and the entrapment defense. Ill L Rev 1207

Dworkin G (1985) The serpent beguiled me and I did eat: entrapment and the creation of crime. Law Phil 4:17

Hay B (2005) Sting operations, undercover agents, and entrapment. Mo L Rev 70:387

Joh EE (2009) Breaking the law to enforce it: undercover police participation in crime. Stan L Rev 62:155

Marx GT (1982) Who really gets stung? Some issues raised by the new police undercover work. Crime Delinq 28:165–169

Marx GT (1988) Undercover: police surveillance in America

Marx GT, Fijnaut C (eds) (1995) Undercover: police surveillance in comparative perspective

McAdams R (2005) The political economy of entrapment. J Crim L Crim 96:107

Moore CD (1995) The elusive foundation of the entrapment defense. Nw U L Rev 89:1151

Park R (1976) The entrapment controversy. Minn L Rev 69:163

Roiphe R (2003) The serpent beguiled me: a history of the entrapment defense. Seton Hall L Rev 33:257

Ross JE (2004a) Impediments to transnational cooperation in undercover policing: a comparative study of the United States and Italy. Am J Comp Law 52:569

Ross JE (2004b) Valuing inside knowledge: police infiltration as a problem for the law of evidence. Chi-Kent L Rev 79:1111–1115
Ross JE (2007) The place of covert surveillance in democratic societies: a comparative study of the United States and Germany. Am J Comp L 55:493–512
Seidman LM (1981) The Supreme Court, entrapment, and our criminal justice dilemm, 1981. Sup Ct Rev 111
Sherman J (2009) "A person otherwise innocent": policing entrapment in preventative, undercover counterterrorism investigations. U PaJ Const L 11:1475
Stevenson D (2004) Entrapment and the problem of deterring police misconduct. Conn L Rev 37:67–73
Yaffe G (2005) "The government beguiled me": the entrapment defense and the problem of private entrapment. J Ethics Soc Phil 1:2

Law, Diversion and Community Sanctions in Juvenile Justice

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Overview

Most criminal justice systems today have introduced alternatives to imprisonment. The general idea behind diversion and alternative sanctions is to keep the offender within society and to save him from the socially detrimental outcomes of imprisonment. This entry aims to give an overview about diversion strategies and alternative sanctions in juvenile justice systems which can in many countries be seen as pioneers for law reforms in the adult criminal justice systems.

Fundamentals of Juvenile Justice Systems

Generally speaking, the common idea of juvenile justice systems is that minors or juveniles should be dealt with differently than adults. According to criminological research results worldwide, juvenile delinquency and crime are episodic and regularly disappear in early adulthood. Consequently – and in line with Art. 40 (4) of the United Nations' Convention on the Rights of the Child (CRC) and many subsequent international instruments – justice systems have introduced special regulations for juvenile offenders which provide educational measures and sanctions instead of imprisonment as responses to youth criminality. The intention is to avoid compromising the developmental process of young persons in the transitional stage from youthfulness to adulthood. This development and the many international recommendations and conventions in the field of juvenile justice can be seen as the major achievement in modern juvenile criminal policy worldwide.

Justice systems differ in their approaches to youth offending. Parts of the juvenile justice systems are more justice oriented, which can mean that they sentence young offenders based on notions of punishment and accountability but also on the idea of proportionality, thus limiting interventions in order to avoid disproportionate sanctions. The idea of education and rehabilitation which is inherent also to justice-oriented juvenile justice systems is implemented by giving priority to diversion and community sanctions ("subsidiarity" of punishment or "education instead of punishment"). Therefore, in justice systems like in *Canada* or some *European states*, we find justice-oriented criminal procedural laws for juvenile offenders, oftentimes with extensive modifications compared to those for adults but by nature based on criminal law. Those are regularly focused on the offender rather than the offence, and the aim of rehabilitation plays a special role. Other juvenile justice systems are more oriented at family or youth welfare law. This includes that the offence is rather seen as a sign for the "need of help" of the juvenile and therefore leads to welfare or family law measures (e.g., in *Poland* or *Bulgaria*), and in some countries, family conferences play an important role in the practice of juvenile justice (e.g., *New Zealand*, *Northern Ireland*, or *Canada*). As more or less pure welfare-oriented systems do not provide for criminal sentences they allow for sometimes far-reaching transfers of juvenile offenders to adult criminal courts as in the *United States*.

Nowadays, as a result of manifold developments, we can hardly find a pure welfare or justice approach in one country. Systems that combine welfare as well as justice elements and that have introduced even more and different approaches to responding to young offenders are more common (Winterdyk 2002; Doob and Tonry 2004; Cavadino and Dignan 2006; Goldson and Muncie 2006; Junger-Tas and Decker 2006; Hartjen 2008; UNICEF 2008; Dünkel et al. 2011a). They differ in their scope concerning the age groups or the behavior they encompass (e.g., in many systems status, offences can open the door to juvenile justice, in others only "criminal" behavior can lead to reactions from the youth court; see for an overview Doob and Tonry 2004; Pruin 2011). However, due to the requirements of the CRC and their subsequent international instruments, many juvenile justice systems have managed to introduce procedural safeguards to make sure that the state reactions remain proportional to the seriousness of the offence.

Diversion

Definition and Functions of Diversion

One state reaction which is usually used more extensively in juvenile justice compared to adult criminal justice systems is the possibility of diverting young offenders from trial.

In the context of criminal justice, diversion is seen as a headword for decisions, measures, and strategies which aim to avoid formal penal prosecution, trial, and sentences (Koffmann and Dingwall 2007). A more concrete definition of diversion can be as follows: Diversion is the dismissal of the case when the offence is of minor gravity and if formal proceedings do not seem to be appropriate. Diversion follows the procedural principle of "expediency" (in contrast to a strict principle of "legality" which obligatorily requires formal proceedings and court decisions in any case) and its main aim is to avoid stigmatization through formal court proceedings (Dünkel et al. 2011b, p. 1651). In the juvenile justice systems, different forms of diversion are to be found: Diversion can be unconditional or conditional; furthermore, it often means the referral of juvenile offenders to health or social services or to mediation schemes instead of judging them in criminal court proceedings.

Diversion is regularly a decision of the prosecutor at a pre-court level. In many countries diversion can also be adjudicated by the judge, if after an accusation the case seems to be appropriate for a dismissal (e.g., because of reparation efforts by the offender that have been performed in the meantime). In some countries even the police are competent to divert juvenile offenders and therefore to avoid criminal proceedings more or less completely (e.g., police cautionings or warnings in Anglo-Saxon countries).

Particularly in the field of juvenile justice, since the mid-1980s many international recommendations have emphasized that diversion should be given priority as an appropriate and effective strategy of juvenile crime policy (e.g., Convention on the Rights of the Child of 1989, Article 40 (3) b), emphasized by Comment No. ten on Children's Rights in Juvenile Justice from 25 April 2007; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice [Beijing Rules] of 1985, Rules No. 11.1–11.4; the United Nations Guidelines for the Prevention of Juvenile Delinquency [Riyadh Guidelines] of 1990, Rules No. 5 and 6; the United Nations Standard Minimum Rules for Non-custodial Measures [Tokyo Rules], Rule No. 5 and on the European level; the Council of Europe's Recommendation on "New ways of dealing with juvenile delinquency and the role of juvenile justice" of 2003 [Rec 2003 (20)], Rules 7, 8, and 10; and the European Rules for Juvenile Offenders Subject to Sanctions or Measures [ERJOSSM, Rec (2008) 11], Rules 5, 10, and 12).

The concept of nonintervention (or better avoiding formal prosecution) was developed in combination with decriminalization (particularly of so-called status offences) and deinstitutionalization (from youth custody and residential homes). Since the 1960s particularly in North America and across Europe, tendencies in juvenile criminal policy have emerged that are based

on the notions of the principles of "subsidiarity" and "proportionality" of state interventions against juvenile offenders (Dünkel 2009). More specifically, these developments also involve the expansion of procedural safeguards on the one hand and the limitation or reduction of the intensity of interventions in the field of sentencing on the other. One major element of this philosophy was the idea of diversion, i.e., to avoid possibly stigmatizing state interventions in favor of a more lenient and – with regard to future social integration – more appropriate approach.

In spite of heavy criticism in the early 1980s, blaming "net-widening" effects and informal social control that would even surpass formal social control of the youth courts (Austin and Krisberg 1982), diversion has continued its "triumphant" expansion due to national and international developments in juvenile crime policy in the 1980s. Nowadays, apart from the aim to avoid (unnecessary) stigmatization, diversion in juvenile justice is based on the idea that education should be prioritized over punishment. From the perspective of sociology of law, the advantage of nonintervention or less severe punishment (e.g., probation instead of imprisonment) lies in the increased expectations of future norm conformity, which are expressed by the competent punishing authority to the offenders in question. The violator of the norm is under the pressure of a special (informal) obligation as he has been given a "social credit" which contributes to better compliance with the norm (see Dünkel et al. 2011b, p. 1628 with further references.).

Furthermore, the use of diversion is oftentimes related to the pragmatic consideration of reducing or limiting the courts' caseload (see in general Jehle and Wade 2006). It can be shown that an increase of cases in the criminal justice system needs to be compensated by diversionary or other bureaucratic strategies that make the "input" manageable.

Types of Diversion

Types of diversion can be distinguished by the different authorities who are competent to decide on the dismissal of the case (diversion). Diversion can be initiated by the police, the prosecutor, or the judge.

A young offender's first contact with the justice system is mostly the police. This is why police diversion is generally recommended by the international instruments (see, e.g., No. 11.2 of the Beijing Rules or No. 5.1 of the Tokyo Rules). The advantage of diversion at this early stage of the procedure is that the police can react promptly, so that there is immediacy between committing the offence and the justice system's response. On the one hand, a swift reaction is seen positively from a pedagogic point of view (if the police act cautiously and with respect). On the other hand, the amount of time during which the offender could be stigmatized is reduced. The police have a lot of discretional power in such a system. The resulting dangers could be prevented through the condition that the police have to undergo specific training on contact with young offenders.

Consequently, many juvenile justice systems, mostly in countries where the role of the public prosecution service is not very strong, introduced the possibility of "police diversion." "Police diversion" can mean that the police, to whose attention an offence committed by juveniles has come, is competent to simply take no further action because the behavior in question is viewed as being very minor, petty, and unimportant (e.g., *Cyprus, England/Wales*). In other systems the police can issue informal or formal warnings or can refer the juvenile to special diversion schemes in close cooperation with the Social Services (e.g., *Northern Ireland, Ireland, the Netherlands*).

Other countries strictly follow the procedural principle of "legality." Originally the principle of legality means that a human conduct must be declared as a crime by a specific statute or law before it can be considered as a criminal act. The strict consequence from this principle is that a special prosecution service must bring a charge against any criminal offender. If the laws in these countries provide for any form of pre-court diversion, usually the prosecution services, consisting of lawyers, are competent to decide about dismissing the case or to refer it to

a special diversion scheme. Usually the decisions of the prosecution services are conditional. This means that the prosecution service offers to close the criminal proceedings when the offender has fulfilled special obligations like repairing the damage or participating at anti-aggression trainings.

In some countries, diversionary decisions can also be made by a judge at the court level. Such court diversion makes sense particularly in cases when the juvenile has paid reparation or has otherwise resolved the conflict with the victim after the prosecutor has submitted the indictment to the court, which gives the judge the impression that further prosecution would not be appropriate or necessary. Especially the countries following the traditional welfare model have facilitated diversionary strategies on a court level because of the wide discretionary power of the juvenile judge.

In consideration of the different competent authorities, juvenile justice systems generally introduced a way to divert a case and combine the conditional dismissal of the case with educational measures or interventions. The systems for this kind of "interventionalist diversion" vary.

In many countries, minor offences can be dismissed after educational measures have taken place (e.g., mediation, victim-offender reconciliation, reparation, apology to the victim). The idea is that if the conflict is already solved within the society, there is no need to further stigmatize the offender or to spend much money on cost-intensive criminal procedures. So, for example, if in *Germany* at the time of the beginning of the prosecution the offender has already apologized and paid for the damage he produced, the public prosecutor can dismiss the case without any further conditions (the German Juvenile Justice Act even encourages the prosecutor to regularly do so; see Sect. 45 al. 2 JJA).

A similar approach is followed in countries where diversion in combination with (minimum) educational interventions is seen as a possible option. One alternative is that the prosecutor or the judge can suspend the case for a certain period of time. The case will be dismissed after the offender has fulfilled special obligations, like community work or reparation of the damage or participation at certain "training courses." A comparable approach is quite common in Eastern European countries with the so-called release from criminal liability, which can be combined with educational measures.

In some countries, diversion can be combined with a referral to the Social Services (*Sweden*) or special administrative authorities/bodies, like the "Children's Hearings System" (*Scotland*) or the "Juvenile Commissions" in *Bulgaria*, *Estonia*, or *Russia*. These bodies can partly issue and partly negotiate the fulfillment of special educational obligation. The transfer of responsibility and sanctioning power to administrative bodies makes it important to guarantee that juvenile justice standards are respected on this level as well. According to the international recommendations, these kinds of administrative authorities likewise have to avoid each form of deprivation of liberty as a reaction to criminal behavior. Questionable is if "Juvenile Commissions" as they can be found in Eastern and Central Europe constitute an appropriate way of diversion. Not always the commission's decisions are subject to judicial review, even if they may include the placement of a juvenile in a closed institution (UNICEF 2008, p. 25). An interesting approach in this sense is the idea of introducing conferences to divert juvenile offenders from criminal proceedings which is apparently most developed in *New Zealand*: The police have to refer all juvenile offenders who have not been arrested and charged to a family group conference. If the conference can resolve the matter, there will be no further public reaction. The youth court is required to refer all cases coming to it for a family group conference as well (Maxwell and Morris 2006, the European approaches for the introduction of family conferences are described by Doak and O'Mahony 2011).

Efficiency of Diversion

Measuring the efficiency of sanctions is one of the most complicated issues in criminological research. Usually different sanctions are applied for different kinds of offences and offenders. This leads in practice regularly to a selection bias which makes it almost impossible to ascribe

recidivism (or legal behavior) to the inefficiency (or efficiency) or the sanction (validity). Reducing a desired behavior to a special sanction is only possible with the help of studies using random assignment or quasi-experimental design (standards for evaluations were developed by Sherman et al. 1998; see also the chapters of MacKenzie and Shapland in this volume). Most study designs do not follow these standards, as it is in a criminal justice system difficult to allocate one or another sanction randomly.

With regard to diversion, there are at an international level study results which indeed used random assignment or quasi-experimental design which predominantly arrived at the conclusion that recidivism rates after diversion are lower, or at least not higher, than after formal court procedures and convictions. According to German studies, the strategy of expanding informal sanctions has insofar proved to be an effective means, not only to limit the juvenile court's workload, but also with respect to special prevention (see Heinz 2005; Dünkel 2011).

According to German data, reconviction rates of offenders who were "diverted" instead of being formally sanctioned are significantly lower (reoffending rates after a risk period of 3 years were 27 % vs. 36 %, see Dünkel 2011). Even for repeat offenders the reoffending rates after informal sanctions were not higher than after formal sanctions (see Heinz 2005, p. 306). Another study demonstrates that the increase in the use of diversion in Germany during the 1980s and 1990s does not correspond to an increase of juvenile delinquency rates. On the contrary, the recidivism rates of comparable delinquents (for different typical juvenile delinquent acts) were significantly lower when diverted as compared to those formally sanctioned by the youth court (see Dünkel et al. 2011b, p. 1639 with further references). The evident methodological problems of comparing different sanctions (concerning the seriousness of different crimes, previous convictions, etc.) were addressed by British empirical research which strictly controlled the different "sanction groups" for key variables such as age, sex, and previous criminal history. The research results demonstrate that conditionally discharged offenders had lower reconviction rates (39 %) than those sentenced to fines (43 %), probation (55 %), or community service (48 %, see Moxon 1998, p. 91). The meta-analysis of *Whitehead* and *Lab* supports the findings that diversion has the best prognosis with regard to recidivism. As far as can be seen, only the study of Morton and West (1983) could not find any reduction in recidivism from the use of youth diversion as opposed to youth courts (in *Canada*).

Looking at the costs and the impact of different sentences and interventions, it is evident that informal warnings and cautions are the least expensive measures. Further research on "what works, with whom under which circumstances" including serious control of the selection bias needs to be continued in this context.

Community Sanctions

Definition and Functions of Community Sanctions

If a case is not diverted but reaches the level of the court, many juvenile justice systems provide a lot of different dispositions as well. The so-called community sanctions define all sanctions and measures which do not lead to deprivation of liberty in any form (see Beijing Rules, No. 18). They are important as a basis to comply with the principle that no child shall be deprived of liberty except as a "last resort," as required by Article 37(b) of the Convention on the Rights of the Child. The reform movement to widen the scope of community or alternative sanctions started in the 1970s in the *United States* and *England* and later developed in the 1980s in many other juvenile (and adult criminal) justice systems. The base for the introduction of community sanctions is seen as twofold: On the one side a shift in people's attitude towards punishment emerged which tried to make criminal justice more humane (Junger-Tas 1994, p. 1). On the other hand, there was the problem of overcrowded prisons in many countries which forced to find and to use alternatives (e.g., Bala and Roberts 2006, S. 37). If we look at today's different

juvenile justice systems, we do find many differences regarding the extent and types of community sanctions.

Types of Community Sanctions

As a general rule, the applicable sanctions and measures follow a certain hierarchy that is based on the order in which priority shall be given to the most educational, most appropriate sanction. This regularly opens up the possibility to combine several educational measures or sanctions with each other. We can find the following levels of sanctioning, ordered from the least to the most intrusive:

1. Warnings, reprimands, conviction without sentence, educational "directives"
2. (Day) fines, community service, reparation orders, mediation
3. Social training courses and other more intensive educational or supervision sanctions
4. Mixed sentences, combination orders (which can be characterized as a more "repressive" (intrusive) way of dealing with juvenile offenders)
5. Suspended sentences without supervision by the Probation Service
6. Probation
7. Suspended sentences with supervision by the Probation Service, electronic monitoring
8. Educational residential care, youth imprisonment, and similar forms of deprivation of liberty

The least invasive sanctions are warnings or reprimands (verbal sanctions) and followed by a wide range of alternative sanctions that exert more or less influence on the life of the offender. Many sanction systems provide educational measures (such as educational "directives" in *Austria* and *Germany*) either as independent sanctions or as complementary elements of other sanctions like probation or suspended prison sentences (e.g., *Denmark*). The aim of such educational directives is always to improve the educational impact on the one hand and to reduce the impact of risk factors in the juvenile's daily life on the other. The laws should confer a certain degree of discretionary power on the judge to enable him or her to find the most appropriate directive. In between we find the possibility to impose a day fine on juvenile offenders which is theoretically possible in many, albeit not all juvenile justice systems. Indeed, one may question if fines could be seen as educational sanctions, facing the fact that juveniles will often be unable to pay for fines with their own money.

Restorative justice elements like victim-offender mediation for juveniles do often play a special role in juvenile justice. Yet, in some (European) countries, mediation is never or only seldom practiced due to a lack of organizational infrastructure at the local level, as reported by the *Czech Republic*, *Poland*, *Romania*, and *Serbia* (Dünkel et al. 2011a). Such kinds of "restorative justice orders" can be manifold and creative in aiming at compensating the victim.

In many countries, community service combines slight "punishment" with reparative and rehabilitative elements. The offender shall offer "a 'payback' to the community via unpaid work" (Goldson 2008, p. 78). Some countries have special age limits for the imposition of community service: For example, in *England* and *Wales*, *Ireland*, and *Northern Ireland*, community service can only be imposed on juveniles aged 16 or older. Huge differences can be observed with respect to the maximum number of hours: The limit lies between 30 h in *Belgium* and 250 h in *Canada*, 300 h in Denmark, or even 400 h in New Zealand (see Dünkel and Lappi-Seppälä in this volume). The differences in legislation are partly due to different approaches and settings for community service orders: For example, in *Finland* a high number of hours (regularly only for young adults aged 18–20) will replace a sentence of up to 8 months of unconditional imprisonment (Dünkel et al. 2011a, p. 1647).

Different from community service is the sentence of "corrective labor," which can be found primarily in Central and Eastern Europe. Corrective labor may be imposed on a juvenile offender at the place of his/her regular employment for a particular length of time. In the course of corrective labor, deductions from the offender's earnings shall be made in favor of the state in the amount specified in the court ruling within a certain limit (UNICEF 2008, p. 30).

Many countries have successfully implemented creative and constructive measures such as social training courses (*Germany*) or so-called labor and learning sanctions or projects (the *Netherlands*), where the juveniles can learn to deal with their aggressive potential or where they can be trained according to their personal skills.

Some countries have introduced high intensive supervision or educational orders, e.g., special "centers" to which juvenile offenders can be sent for a few hours a day. In *England* and *Wales*, the attendance center order requires a young person to be present at a (usually) police-run institution on Saturday afternoons, where juveniles engage in physical education and other activities designed to inculcate a sense of discipline or social skills, for sessions up to a maximum of 36 h. In *Kosovo*, the court can commit a minor to a disciplinary center for a maximum of 1 month (for up to 4 h per day) or for a maximum of 4 days of a school or public holiday (for up to 8 h per day). In *France*, the law of 5 March 2007 created a new educational measure, *activities during the day* (*mesure d'activités de jour*), in which the juvenile is involved in vocational or school insertion activities at a public or qualified private institution or agency. In *Italy*, the magistrate can order the minor to carry out study or work activities in special working groups. Looking at the strict definition above it may be questionable if these measures fall into the scope of "community sanctions." However, because they are used in practice to avoid imprisonment or comparable forms of deprivation of liberty in predominant closed institutions, they deserve to be listed within this category. This is not the case for short-detention centers, where juveniles can be sent to for some days or weeks with the aim to deter the offender via a "short sharp shock." Even if some jurisdictions try to avoid "real" imprisonment with the introduction of this short-term incarceration, this however falls within the definition of deprivation of liberty as it takes the juvenile out of his social surroundings and endangers him with the negative aspects of stigmatization and other negative outcomes of imprisonment.

In many countries, supervision or surveillance orders play a special role as alternatives to imprisonment. In most countries, the Social Service or the Probation Service is responsible for the execution of these measures, but in some countries, juvenile offenders are usually supervised by the legal representative, normally the parents (e.g., "house arrest" in *Italy*). The aim is to avoid isolating the minor from his/her familiar and social surroundings in order to prevent disturbances to his/her personal development.

In *Finland* the Juvenile Punishment Order consists of work programs, supervision, and activity programs that aim to promote social adjustment, the person's sense of responsibility, and his/her social relations. There is a strict requirement that this sentence can only be issued in high-risk cases. This requirement may prevent net-widening effects as the Juvenile Punishment Order is definitively only applied in cases of repeat offenders who have already been sentenced to conditional imprisonment.

Contrarily, in *England and Wales* the introduction of the so-called referral order could well be having a net-widening effect, since it is more invasive and rigorous than the conditional discharge that it has essentially replaced in practice. "Action plans" or "referral orders" in contrast to the *Finnish* "Juvenile Punishment Order" follow a more punitive approach (Dünkel et al. 2011a, p. 1651 with further references).

In some juvenile justice systems, it is possible to confiscate a person's driver's license or to issue a prohibition from driving a vehicle as independent sanction or measure. In these cases the courts have to consider a certain susceptibility to unequal treatment, because there are special groups of juveniles or young adults who are more dependent on driving a car than others (due to work obligations, poor local infrastructure, etc.). There are serious reservations against the temporary withdrawal of a driver's license as a stand-alone sanction, especially if it is used for other than only traffic-related offences. The future integration of juveniles is often more difficult when their mobility is hampered. Therefore, educational efforts should be made to allow juveniles to participate in traffic in a responsible manner.

Social traffic training courses seem to be the appropriate answer, rather than excluding juveniles from mobility – particularly when they live in rural areas (Dünkel et al. 2011a).

Many juvenile justice systems provide suspended juvenile prison sentences that frequently go hand in hand with supervision by the Probation Service or a similar service with a social work approach. The "Continental European Model" of suspended sentences implies the imposition of a youth prison sentence, the execution of which is not immediate. Should an offender fail to meet the conditions of probation, suspension (as a last resort) can be revoked and the juvenile serves the term of imprisonment set at the first trial (e.g., in *Austria*, *Bulgaria, Germany*, or *Spain*). Other criminal systems like in the *United States* or the states of the *United Kingdom* introduced probation as a special sanction. This sanction is – as its name indicates – always connected with support from and control by the Probation Service. Contrary to the "Continental European Model," in these countries no term of detention is fixed. Therefore, where an offender fails to comply with his or her probationary requirements, the term of imprisonment is determined in a second sentencing trial. Here one finds another explicit example for how the same terms can mean different things in international comparative analyses: Many countries use the term "probation" to describe the "Continental European" approach of "suspended sentences with supervision."

Apparently no juvenile justice system has managed to totally avoid imprisonment or detention for juveniles. Many different forms of deprivation of liberty with corresponding institutions can be found worldwide, like youth prisons, detention centers, closed educational care, or schools "for juveniles with special needs" (see Dünkel and Stańdo-Kawecka 2011).

Especially researchers and practitioners from Central and Eastern European countries claim that oftentimes the laws in their countries do provide a lot of alternative sanctions, but the judges or prosecutors do not apply them. The reason mostly lies in the lack of infrastructure. The law might allow for victim-offender mediation – but if no organization or no service is available to offer mediation, this promising new approach will gain no importance in practice. Another problem related to the implementation of alternative sanctions is oftentimes that the question of funding is not responded or clear.

Efficiency of Alternative Sanctions

Research results on the efficiency of alternative sanctions are not as clear as for diversion (see above) and share the same problems with respect to the selection bias. However, there is some evidence that alternative sentences "work" better than liberty-depriving sentences with regard to recidivism, but the results request for differentiations: For example, Latimer et al. (2001) or Sherman and Strang 2007 showed that restorative justice programs can reduce recidivism, but there is a wide variation in their effects (see also the chapters of MacKenzie and Shapland in this volume). In general, international results show that positive effects rather are to be expected from programs comprising behavior therapy, oriented towards social learning, and tailored to the needs of the offender than from punitive sentencing and/or imprisonment (e.g., Murphy et al. 2010 with further references; MacKenzie in this volume). In contrast, programs focusing on discipline or deterrence through fear of consequences showed negative or minimal positive effects (Lipsey and Howell 2012, p. 517 with further references). Not surprisingly alternative sanctions have proven to be cost-effective compared to the immediate and belated costs of imprisonment (Aos 2006; UNODC 2007).

The Relevance of Diversion and Community Sanctions in Practice

Oftentimes the country's "law in the book" does not correspond to the "law in practice." To investigate whether the countries use their manifold possibilities in sentencing juvenile offenders is

not always an easy task: Apart from the general problems that arise when working with statistical data about crime and reactions to crime in a large number of countries (e.g., offences are in some countries registered in relation to the offence, in other countries in relation to the offender), the collection of data about sentencing in a juvenile justice system varies a lot. Sometimes an absence of reliable statistical records can be observed (see Goldson and Muncie 2006, p. 2), and even where statistical records do exist, practice of how crimes (and clear-ups) are recorded varies greatly (see Cavadino and Dignan 2006, p. 4). Thus, comparability can only be achieved through lots of interpretation. This makes an international comparison of statistical data difficult enough. The above-described wide variety of alternative sanctions in the different juvenile justice systems complicates matters further, and the different age groups that are covered by the different juvenile justice systems all over Europe additionally hinder comparability. With regard to the use of alternative sanctions in practice, it is possible to present some structural tendencies (for Europe see Dünkel et al. 2011b). Diversion has experienced a triumphant expansion in many European countries such as *Austria*, *Germany*, *Ireland*, the *Netherlands*, *Northern Ireland*, *Romania*, *Slovenia*, *Spain*, and *Sweden*, where more than 50 % and up to 70 % (Germany) or even about 80 % (*Northern Ireland*) of cases involving juvenile offenders are diverted. Other countries like *New Zealand*, *Scotland*, or *Sweden* regularly refer juvenile offenders to special institutions, conferences, or social services.

Many of those countries who do not make extensive use of diversion, primarily apply court-based community sanctions, e.g., in the *Czech Republic*, *Spain* (Catalonia), and *Switzerland*. *Slovenia* is an extreme case as in 98 % of court decisions educational measures are applied. The same is true for *Serbia* (95 %). In many Central and Eastern European countries, the suspended prison sentence is still the predominant community sanction, often because of a lack of infrastructure for other, more educational alternatives (e.g., in the *Czech Republic*, *Hungary*, *Latvia*, *Russia*, and *Slovakia*). The *United States* are infamous to sentence young offenders rather based on notions of punishment and accountability than rehabilitation, but alternative sanctions are still seen on the rise (Bishop and Decker 2006, p. 29).

Still there are countries where custodial sentencing is obviously seen as a promising answer to juvenile offending and of considerable importance in practice. *Bulgaria*, *Lithuania*, *Romania*, *Russia*, and *Spain* (particularly Catalonia) could be classified as belonging to this group. In *Bulgaria* traditionally 80–90 % of court disposals had been sentences to imprisonment, but after the law reform of 1999, the proportion of prison sentences for juvenile offenders dropped to "only" 47 % (2005). In *Romania* and *Russia*, however, compared to the Soviet time, decreasing proportions of custodial sanctions are evident. In *Spain* increasing numbers of custodial sanctions have been imposed only recently. As indicated above, some countries, mainly from Central and Eastern Europe, report that they have introduced a wide variety of alternative sanctions which are not in use to a greater extent in practice due to the missing infrastructure and unclear funding.

Conclusion

Juvenile justice systems reveal numerous possibilities to divert juvenile offenders from the criminal justice system or to offer them alternative sanctions. In many countries lawmakers and practitioners seem to be convinced that juveniles shall be saved from the socially detrimental outcomes of imprisonment, and the international recommendations which request the use of custodial sanctions only as a last resort demand the criminal justice systems to seek for effective alternatives.

As available research results allow for the gently conclusion that diversion "works" in means of the reduction of recidivism, data records on the efficiency of alternative sanctions do not allow for entirely clear positive conclusions. However, is it the correct way to ask the alternatives to imprisonment to proof their

efficiency when we definitely know that imprisonment or comparable ways of custodial sanctions/measures are not at all adequate to reduce recidivism? Alternative sanctions violate human rights less than imprisonment does and are to be preferred due to the minimum intervention principle (UNODC 2007; see, however, to human rights issues in this area the chapter of Morgenstern and van Zyl Smit in this volume). And even if research shows that the cost-effective sanctions are not always superior in preventing reoffending, it is true that it is attractive for criminal justice systems to make a wide use of alternative sanctions from an economic point of view as well. This is why diversion and alternative sanctions should be extended or, where available, used more frequently in practice. Further research with random assignment or quasi-experimental design would be desirable to support the triumphal procession of alternatives to imprisonment in juvenile justice systems.

Related Entries

- ▶ Community Service in Europe
- ▶ Examining the Effectiveness of Correctional Interventions
- ▶ History of Juvenile Justice
- ▶ International Human Rights Standards and Community Sanctions
- ▶ Juvenile Diversion
- ▶ Juvenile Justice in the Get Tough Era
- ▶ Probation and Community Sanctions

Recommended Reading and References

Aos S (2006) Evidence-based public policy options to reduce future prison construction, criminal justice costs, and crime rates. http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf

Austin J, Krisberg B (1982) The unmet promise of alternatives to incarceration. Crime Delinq 28:374–409

Bala N, Roberts JV (2006) Canada's juvenile justice system: promoting community-based responses to youth crime. In: Junger-Tas J, Decker S (eds) International handbook of juvenile justice. Springer, Berlin/New York, pp 37–64

Bishop DM, Decker SH (2006) Punishment and control: juvenile justice reform in the USA. In: Junger-Tas J, Decker S (eds) International handbook of juvenile justice. Springer, Berlin/New York, pp 3–35

Cavadino M, Dignan J (2006) Penal systems. A comparative approach. Sage, London/Thousand Oaks/New Delhi

Doak J, O'Mahony D (2011) Developing mediation and restorative justice for young offenders across Europe. In: Dünkel F, Grzywa J, Horsfield P, Pruin I (eds) Juvenile justice systems in Europe – current situation and reform developments, 2nd edn. Forum-Verlag, Bonn-Bad Godesberg, pp 1717–1746

Doob AN, Tonry M (2004) Varieties of youth justice. In: Tonry M, Doob AN (eds) Youth crime and justice. University of Chicago Press, Chicago/London, pp 1–20, Crime and Justice Vol. 31

Dünkel F (2009) Diversion – a meaningful and successful alternative to punishment in European juvenile justice systems. In: Junger-Tas J, Dünkel F (eds) Reforming juvenile justice. Springer, Berlin/New York, pp 147–163

Dünkel F (2011) Germany. In: Dünkel F, Grzywa J, Horsfield P, Pruin I (eds) Juvenile justice systems in Europe – current situation and reform developments, 2nd edn. Forum-Verlag, Bonn-Bad Godesberg, pp 547–622

Dünkel F, Stańdo-Kawecka B (2011) Juvenile imprisonment and placement in institutions for deprivation of liberty – comparative aspects. In: Dünkel F, Grzywa J, Horsfield P, Pruin I (eds) Juvenile justice systems in Europe – current situation and reform developments, 2nd edn. Mönchengladbach, Forum-Verlag, pp 1789–1838

Dünkel F, Grzywa J, Horsfield P, Pruin I (eds) (2011a) Juvenile justice systems in Europe – current situation and reform developments, 2nd edn. Forum-Verlag, Mönchengladbach

Dünkel F, Pruin I, Grzywa J (2011b) Sanctions systems and trends in the development of sentencing practices. In: Dünkel F, Grzywa J, Horsfield P, Pruin I (eds) Juvenile justice systems in Europe – current situation and reform developments, 2nd edn. Forum-Verlag, Mönchengladbach, pp 1649–1716

Goldson B (2008) Dictionary of youth justice. Willan Publishing, Cullompton/Devon.

Goldson B, Muncie J (2006) (eds) Comparative youth justice. Sage, London, Thousand Oaks, New Delhi

Hartjen CA (2008) Youth, crime and justice: a global inquiry. Rutgers University Press, New Brunswick

Heinz W (2005) Zahlt sich Milde aus? Diversion und ihre Bedeutung für die Sanktionspraxis. Teil 1 und 2: Zeitschrift für Jugendkriminalrecht und Jugendhilfe. 16, p 166–178, 302–312

Jehle J-M, Wade M (2006) Coping with overloaded criminal justice systems. The rise of prosecutorial power across Europe. Springer, Berlin

Junger-Tas J (1994) Alternatives to prison sentences. Experiences and developments. Kugler Publications, Amsterdam

Junger-Tas J, Decker S (eds) (2006) International handbook of juvenile justice. Springer, Berlin

Junger-Tas J, Dünkel F (2009) Reforming juvenile justice: European perspectives. In: Junger-Tas J, Dünkel F (eds) Reforming criminal justice. Springer, Berlin, pp 215–233
Koffmann L, Dingwall G (2007) The diversion of young offenders: a proportionate response? In: Web journal of current legal issues. http://webjcli.ncl.ac.uk/2007/issue2/koffman2.html
Latimer J, Dowden C, Muise D (2001) The effectiveness of restorative justice processes: a meta-analysis. Research and Statistics Division, Department of Justice, Ottawa
Lipsey MW, Howell JC (2012) A broader view of evidence-based programs reveals more options for state juvenile justice systems. Criminol Public Policy 11:515–523
Maxwell G, Morris A (2006) Youth justice in New Zealand: restorative justice in practice? J Soc Issues 62(2):239–258
Morton M, West G (1983) An experiment in diversion by a citizen committee. In: Corrado R, LeBlanc M, Trepanier J (eds) Current issues in juvenile justice. Butterworths, Toronto
Moxon D (1998) The role of sentencing policy. In: Goldblatt P, Lewis C (eds) Reducing offending: an assessment of research evidence on ways of dealing with offending behaviour. Home Office Research Study 187, London, pp 85–100
Murphy P, McGinness A, McDermott T (2010) Review of effective practice in juvenile justice. http://www.djj.nsw.gov.au/pdf_htm/publications/general/Juvenile Justice Effective Practice Review FINAL.pdf
Pruin I (2011) The scope of juvenile justice systems in Europe. In: Dünkel F, Grzywa J, Horsfield P, Pruin I (eds) Juvenile justice systems in Europe – current situation and reform developments, 2nd edn. Forum-Verlag, Mönchengladbach, pp 1539–1582
Sherman LW, Strang H (2007) Restorative justice: the evidence. Smith Institute, London, http://www.smith-institute.org.uk/pdfs/RJ_full_report.pdf
Sherman LW, Gottfredson D, MacKenzie D, Eck J, Reuter P, Bushway S (1998) preventing crime: what works, what doesn't, what's promising. http://www.ncjrs.org/works/download.htm
UNICEF (2008) Lost in the justice system. Children in conflict with the law in Eastern Europe and Central Asia. http://unicef.hu/documents/10552/30013/Lost_in_the_Justice.pdf
United Nations Office on Drugs and Crime [UNODC] (2007) Handbook of basic principles and promising practices on alternatives to imprisonment. http://www.unodc.org/pdf/criminal_justice/07-80478_ebook.pdf
Whitehead JT, Lab SP (1989) Meta-analysis of juvenile correctional treatment. J Res Crime Delinq 26(3):276–295
Winterdyk JA (2002) Juvenile justice systems: international perspectives, 2nd edn. Canadian Scholars' Press, Toronto

Lawful Killings

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Synonyms

Dowry deaths; Executions; Honor killings; Legal interventions; Mob killings; Witchcraft

Overview

Homicide is frequently used as an indicator of violence. Its statistical superiority originates from the seriousness of this crime and from a broad availability of relevant data from law enforcement and criminal justice sources. Definitions of homicide for statistical purposes tend to focus on the intentionality and premeditation of death inflicted on a person by another person and exclude unintentional acts (non-culpable – manslaughter). Nevertheless, definitions of homicide across countries show marked differences, depending on penal codes and what is considered unlawful. Indeed, different cultures tend to criminalize different acts and behaviors.

A cross-country comparison of data based on "homicide," therefore, should take into account that the indicator includes the elements which are criminalized in each country and may exclude others, which are not.

Behaviors defined in this entry as "lawful killings" are acts with lethal consequences which are tolerated by some cultures and therefore do not appear in some homicide statistics. This is the case with "honor" killings, which are not criminalized in several countries.

The term "lawful killings" is used throughout the entry to indicate many different types of killings which in some contexts are considered

"justified," or less serious from a legal point of view than plain killings. This may happen because of cultural, ethical, political, or legal reasons. Depending on countries and cultures, this could be the case with any of the following: killing in self-defense; killing in revenge or retaliation; killing as a result of provocation; killing to eliminate the pains of incurable patients; killing to defend the "honor" of a person or a family. In some cases, States take in their hands the authority to kill to defend the public order (legal interventions) or to punish someone for having killed someone else (death penalty).

This entry focuses on some specific forms of killings, namely, "honor" killings, dowry deaths, killing of persons accused of witchcraft, and mob killings, and how they relate with homicide concepts and categories. The current debate highlights two sides of the problem: on the one hand, in some countries/contexts these acts still fail to be recognized as forms of violence, sometimes even as crimes, depending on specific traditions and beliefs. Perpetrators of these killings frequently get away with committing these crimes, or enjoy more lenient investigations and sentences. On the other hand, in the countries where these killings are part of the homicide category, the seriousness of these acts may be insufficiently emphasized, and some advocate for perpetrators to be subject to sanctions harsher than those inflicted for homicides.

The entry also considers some examples of data collection or specific studies aimed at capturing relevant data to measure the extent of these phenomena.

What Is in a Label: "Homicide," Criminalization, Culture, and Human Rights

Criminalization

The United Nations Survey of Crime Trends and the Operations of Criminal Justice Systems (UN-CTS), through which UN Member States exchange crime and criminal justice statistical information, defines homicide as "unlawful death inflicted on a person by another person," which could be intentional or not.

What is considered "unlawful" depends on the definition of homicide in domestic criminal law and procedure, as well as the specific legal classification of homicide in each country. The degree of "unlawfulness" and the type of sanction foreseen for specific forms of killing vary across societies "to the extent to which different countries deem that a killing could be classified as such" (United Nations Office on Drugs and Crime 2011, p. 10).

According to Waters (2007, pp. xiii–xiv), "a murder is a social act that involves not only killing, but also judgment and evaluation by society at large" but, still, "[e]ach society has a process through which killings are described as legal justifiable homicide, illegal unjustified homicide (i.e. murder), or just plain killings. The process varies not only with a technical or legal capacity to assign blame but also with the capacity of a particular society to respond in a manner it defines as decisive and appropriate."

The process of defining a particular killing as "unlawful" involves the social context where the act is committed as well as the traditional and cultural codes of the victim and the perpetrator. Some killings may be considered as "lawful," mitigating circumstances invoked and, in some cases, impunity granted to the perpetrators, because the society at large does not consider they have committed any illegal acts. It can therefore happen that killings which are criminalized in some countries may not be in others. Boundaries for such considerations are represented by the cultural and sociological perception of specific issues such as honor, status distinctions, culpability, innocence and blame, as well as the state's approach to legitimate use of force.

In some societies, perpetrators of killings in the name of "honor" or "morality" still get reduced penalties and/or may be exculpated. This happens because the killing is "publicly justified" according "to a social order claimed to require the preservation of a concept of honor vested in male (family and/or conjugal) control over woman" (Welchman and Hossain 2006, p. 4). As sustained by Wolfgang and Ferracuti's

"subculture of violence theory," within some specific ethnic groups and when the values of "honor" and "morality" are strongly perceived and shared in the society, one's capacity for violence may not only be admired but also perceived as an indispensable trait of personality.

Culture

The ecological approach to human development has been applied to criminology to explain the roots of violent crimes across different societies. It highlights the influence of community contexts in which social relationships are embedded and of the larger societal factors, such as cultural norms and attitudes, in explaining the level and dynamics of some specific forms of lethal violence.

Following this approach, homicide can be seen as a social and cultural construct in which the level of "seriousness" and "unlawfulness" can vary not only across different countries but also across different communities within the same country. Because of the way countries are composed and as a result of migration processes, most countries include a variety of ethnic and religious groups, even where a majority of the population shares the same culture.

The influence of culture is crucial to determine which behaviors are criminalized and which are not, reflecting majoritarian cultural values at the time when legislation is passed. Changes in culture and social acceptance of specific values could influence the consideration of specific behaviors as unlawful or not.

Analysis of the World Values Survey (WVS) results (a worldwide investigation of sociocultural and political change, conducted by a network of social scientists at leading universities on national samples of at least 1,000 people in 97 societies in all 6 continents) reveals that many of the basic cultural values closely relate with each other and can be grouped along two major cross-cultural dimensions, namely, one going from "Traditional" to "Secular-rational" values and one from "Survival" to "Self-expression" values.

Moving from "Traditional" to "Secular-rational" values reflects the shift from traditional religious values to secular-rational attitudes. Moving from "Survival" values to "Self-expression" reflects the shift of individual focus from personal and economic security to personal self-expression and quality of life.

Self-expression values, which focus on subjective well-being, freedom to express oneself, and quality of life, may give high priority to environmental protection, promotion of gender equality, tolerance of different characteristics and behaviors (such as migrants, foreigners, gays, and lesbians), and rising demands for participation in decision-making in economic and political life. Moreover, societies that rank high on self-expression values also tend to rank high on interpersonal trust. These types of society may therefore be much less tolerant with regard to any form of deprivation of life and crimes against the individual. Traditional and survival values stress the importance of parent–child ties and traditional family values and reject divorce, abortion, euthanasia, and suicide.

Many of these factors could have a strong influence on some types of lethal violence perpetrated within families. Societies and communities based on strong traditional values could also show higher levels of tolerance with regard to specific types of killings committed in the name of the family's respect and honor (Luopa 2010).

Nevertheless, as a result of globalization, there may be no clear-cut attribution of specific cultural values to specific countries. Therefore, different communities based on very different cultural values and norms may coexist within the same country.

Some types of killings could be "justified," or even considered "necessary" under specific circumstances, by some types of cultural values. More in-depth knowledge of causes and reasons for such considerations may allow preventing and contrasting these forms of lethal violence by focusing on their cultural roots.

Citizens of Western countries still tend to believe that "honor crimes" are a prerogative of Asian and African cultures, while this phenomenon is visibly increasing also in Europe (particularly in France, Sweden, the Netherlands, Germany, UK, and Turkey) and in the US (Council of Europe Parliamentary Assembly 2009, p. 6;

Chesler 2010, p. 3). For example, a recent study found a correlation between higher homicide rates observed in the US South and "culture of honor" as a heritage of herding carried out by early settlers, indicating that "the Southern propensity for homicide stems largely from the cultural background of the early Southern settlers alone and, in any case, is fully accounted for by the cultural background of early settlers together with current economic conditions and demographic characteristics" (Grosjean 2010, p. 20).

Indeed "honor" crimes disappeared from criminal codes in Europe (especially Western Europe) and in the US a long time ago and events of similar nature may be currently registered under the label of "domestic violence." However, their characteristics, motivations, and evolution are completely different. For example, "unlikely domestic violence, honor killings often involve multiple family members as perpetrators" (Chesler 2010, p. 3).

A proper assessment of the extent and distribution of "lawful" killings across different countries is necessary in order to properly prevent, contrast, and sanction them. In this respect, proper recognition of different cultural settings and understanding of how such data would be contributing in terms of policy relevance are necessary. For example, the proposal for an international classification of crime for statistical purposes currently discussed at the UN level considers the categories of *infanticide* and *euthanasia* separately as specific types of intentional homicide (UNODC/UNECE Task Force on Crime Classification 2011, p. 25).

Human Rights Perspective

It is important to place the present subject within the human rights law discourse. Human rights are universal and belong to every human being in every society. Therefore, human rights are generally regarded as neutral.

The issue of homicide has found its corollary in the discussion on "right to life." For human rights law, it is taken for granted that States are not only required to refrain from directly violating the right to life, but are also obliged to take positive measures to protect the individual from abuses committed by other individuals, that is to prevent such crimes and prosecute and punish the perpetrators. If initially, the right to life was envisaged as a protection from direct violations by the state, it has developed to impose on states obligations of prevention in relation to acts perpetrated by private persons.

Under human rights law, impunity for a homicide may constitute a violation of the right to life. Within the international human rights law system, only the regional legal framework, namely, the European Convention on Human Rights, specifies in a detailed way limitations on the right to life. In particular, it allows limitations of a right to life under certain conditions resulting from the use of force among others in self-defense from unlawful violence, "which is no more than absolutely necessary" (Article 2). Thus, domestic legal order may allow self-defense under conditions specified by the relevant human rights treaty. In reality, however, the debate on self-defense is much more complex.

Human rights consequences of the types of killings discussed here do not concern exclusively the right to life. Indeed, many of them involve different forms of discrimination, particularly on the basis of gender and age. A concrete case in point is "honor" killing, where discrimination can be dissected in the fact that laws applicable to this crime envisage an unequal treatment of men and women. Other potential human rights issues at stake may include nondiscrimination and equality as well as violations related to violence against women.

In practice a number of measures have been undertaken to address these issues. The human rights Treaty Bodies and Special Procedures of the United Nation's Human Rights Council have accumulated a considerable practice generally on the right to life but also as a result of the work of the treaty bodies in the context of protection of women and children against violence. General Assembly Resolution 59/165 of 10 February 2005 recalls the obligation of all States to use legislation to prevent and combat crimes in the name of honor with a view to their elimination. It also reminds the duty of states to investigate, prosecute effectively, and document cases of

crimes against women and girls committed in the name of honor and punish perpetrators. Similar recommendations have been put forward in relation to the phenomenon of witchcraft. It is clear that human rights consequences of the "lawful killings" are expansive. International legal framework tends to prohibit all the practices falling under this classification by virtue of guarantees of the right to life and nondiscrimination both at universal and regional levels. States are therefore saddled with a duty to criminalize homicide and homicide-related practices.

Measuring the Extent of "Lawful Killings"

Measuring "lawful killings" requires broadening the perspective beyond criminalization to include the social and cultural aspects related to crime definition and reporting/recording behaviors and procedures. Available homicide statistics may be an adequate tool to measure the incidence of "lawful killings," depending on two levels of challenges to be considered. The first level is related to the general difficulty in comparing crime statistics across countries. The quality of statistics depends indeed on the efficiency of national reporting systems, so that discrepancies in homicide rates across countries may originate from different degrees of efficiency and/or from national-level underreporting or nonreporting issues rather than real differences in violence incidence. Moreover, homicide cases are recorded according to counting rules for statistical classification by using different units (persons, cases, victims) and time of registration (at the time of reporting/discovery of a case, at different point in time during investigation, etc.) so that direct cross-national comparison should be pondered over methodological limitations to avoid misleading interpretations of data.

The second level of challenges depends on operative definitions of crime for data collection and how they affect the classification of homicide data for statistical purposes. The general heading "homicide" may cover substantial differences in the patterns of violence. In general, definitions for unlawful killings vary depending on the involvement of legal concepts related to the perpetrator, such as motivation, involvement, responsibility, and planning. A recent study on European homicide research (Liem and Pridemore 2012) has identified two main elements in national definitions of homicide: intent and premeditation. The role of both intent and premeditation (and/or other aggravating circumstances) determines the criteria for statistical classification of unlawful killings. Differences in homicide statistics across countries, thus, depend also on whether premeditation, intent, and aggravating circumstances are defined by autonomous provisions (Liem and Pridemore 2012, p. 10).

Even when the characteristics of homicide appear clearly defined by criminal law, there are cases that may fit the definition but "there is less consensus on whether or not they should be comprised under the label homicide" (Liem and Pridemore 2012, p. 12). This refers in particular to the categories of attempted homicide, assault leading to death, euthanasia, and infanticide, which in some countries are not considered elements of homicide. Analysis carried out by the European Sourcebook of Crime and Criminal Justice Statistics about the compliance of European countries to the operative definition of homicide ("intentional killing of a person; where possible it should include assault leading to death, euthanasia, infanticide, attempts; but exclude assistance in suicide") based on inclusion/exclusion of such elements in national definitions of homicide demonstrates that only 13 countries out of 36 fully comply with the definition (Aebi et al. 2010, pp. 343–344). Liem and Pridemore (2012, p. 16) have reviewed elements included in national statistics on homicide in 34 countries also in relation to causing death by dangerous driving (which is included by 13), justified killing (10 countries), and nonintentional killings (17 countries). Altogether these findings help in understanding the impact of cross-national differences in defining homicide on the comparison of homicide rates across countries.

Consensus on what is to be considered homicide and what may be excluded, thus

"excusable," depends on a wide range of cultural influences, which may go back to ancient customs incorporated in many countries. This includes a shared acceptance of which circumstances can be considered as mitigating the offense, and the concept of provocation.

While there may be a large consensus in considering mitigating circumstances for killings that occur on duty or to defend life, some cultures may consider legitimate or justifiable the killing of an unfaithful wife or of a child suspected of witchcraft. This generates several types of "lawful killings," for example, mob killings, witchcraft/ritual killings, "honor" killings, and dowry killings, for which some patchy statistics are available.

Table 1 provides some examples of available data and related sources on selected types of "lawful killings", without the ambition to provide a complete picture of their incidence and distribution. Data presented in the table are commented in the relevant sections below.

Mob Killings

The UN Special Rapporteur on extrajudicial killings and summary or arbitrary executions has described mob killings as "those undertaken by individuals or groups who take the law into their own hands. They are killings carried out in violation of the law by private individuals with the purported aim of crime control, or the control of perceived deviant or immoral behavior. Specific incidents of vigilante killings can most usefully be categorized along various axes – such as spontaneity, organization, and level of State involvement – and can be considered in relation to various characteristics – including the precise motivation for the killing, the identity of the victim and the identity of perpetrators" (United Nations 2009, para 51).

These forms of killing have been reported from all around the world to the extent that they do not represent an issue limited to any particular region but they should be considered a potential concern for all States (the report refers to cases recorded in Australia, Brazil, Benin, Burundi, Cambodia, the Central African Republic, Democratic Republic of Congo, Ghana, Guatemala, Guinea, Haiti, Hungary, Indonesia, Jamaica, Kenya, Liberia, Mexico, Nepal, Nigeria, Papua New Guinea, the Philippines, South Africa, Tanzania, Uganda). Victims are most frequently young males, who are often suspected of having committed theft, robbery, or murder, or being accused of witchcraft. The modalities of these killings vary from stoning to burning to lynching by the use of canes, machetes, or any type of weapon (Ng'walal and Kitinya 2006). For example, the Uganda Police provides statistics for *death by mob action*. Data refer to the number of investigations. Since each episode could involve more than a victim, the actual number of persons killed is probably largely underestimated (see Table 2). The increase observed in 2011 was commented by the police as "attributed to thefts, robbery, suspected witchcraft, and dissatisfaction with delayed/omission of justice" (Uganda Police Force 2011, p. 9).

Literature suggests that mob killings are likely to occur where the judicial system is weak and affected by corruption (United Nations 2009; HRW 2010). The summary executions of suspects by angry crowds would then be a response to the limited presence of the State which is perceived as lacking or delaying proceeding against criminals, causing public distrust towards justice and law enforcement institutions. Others point to inefficacy of formal and informal dispute resolution systems and the conflict between the cultural and the legal frameworks. Witchcraft is the typical example of a behavior frequently not recognized by courts, but strongly felt by the traditional culture of society. In these cases, the lynching of alleged witches is perceived by communities as an acceptable alternative form of administration of justice.

Killing of Witches

Another form of "lawful killings" related to belief systems is related to killing of persons accused of witchcraft. This practice is found mainly among tribal communities in Africa, Asia, and Pacific Islands and appears to target mainly women, elders, and children (United Nations 2012). Victims of witchcraft accusations are likely to belong to the most vulnerable

Lawful Killings, Table 1 Examples of data reported in literature on "lawful" killings (mob killings, witchcraft/ritual killings, "honor" killings, dowry killings)

Region	Country	Mob killings	Witchcraft/ ritual killings	"Honor" killings	Dowry killings	Source
Africa	Burundi	75 cases (2009)				Human Rights Watch 2010
	South Africa		132 plus unreported cases (2000)			Petrus 2009
			455 cases (1990–1995)			Carstens 2009
	Tanzania		50 cases (2007–2009)			Dave-Odigie 2010
		1,249 victims (2000–2004)				Ng'walal and Kitinya 2006
	Uganda	1,241 cases (2007–2010)	68 killings (2008–2010)			Uganda Police 2010
	Zimbabwe		42 cases			United Nations 2012
Asia	Bangladesh	161 cases (2011)		2,303 killings and 167 suicides (2000–2011)		Odhikar 2012
					437 deaths (2007–2009)	United Nations 2012
	India		2,028 killings (2000–2011)		89,964 deaths (2000–2011)	NCRB 2000–2011
			240 cases in 2011		8,186 deaths in 2011	
		10 killings in Vaishali (2007)				Digital Journal 2007
	Pakistan			791 murders; 719 suicides; 414 attempted suicides (2011)		HRCP 2010
Caribbean	Jamaica	14 cases (2011)				Jamaica Constabulary Force 2012
Europe	Albania			1 killing (2005)		Chesler 2009
	Denmark			1 killing (2006)		Chesler 2009
	France			1 killing (2002)		Chesler 2009
	Germany			78 killings from (1996–2005)		Oberwittler and Kasselt 2011
				3 killings (2006–2008)		Chesler 2009
	Italy			127 killings[a] (2010)		Karadole and Pramstrahler 2011
	Netherlands (The)			2 killings (2003–2004)		Chesler 2009
	United Kingdom			12 reported cases and 109 cases reinvestigated (2000–2006)		Smartt 2006
				117 cases re-investigated		Khan 2007
				14 killings (1989–2007)		Chesler 2009

(*continued*)

Lawful Killings, Table 1 (continued)

Region	Country	Mob killings	Witchcraft/ ritual killings	"Honor" killings	Dowry killings	Source
North America	Canada			4 killings (1999; 2003; 2007)		Chesler 2009
	United States	4 killings (2005–2006)				United Nations 2009
				10 killings (1989–2007)		Chesler 2009
Oceania	Papua New Guinea	500 cases				United Nations 2012

[a]127 cases of "honor killing" can be identified out of 159 cases of death, which also include suicides of offenders who committed such killings. Cases refer to women killed by men, often with the involvement of acquaintances, relatives, children, etc. (Karadole and Pramstrahler 2011, p. 35)

Lawful Killings, Table 2 Number of investigations of death by mob actions in Uganda. Period 2007–2010

Year	Investigations
2011	383
2010	357
2009	332
2008	368
2007	184

Source: Uganda Police Force (2008–2011)

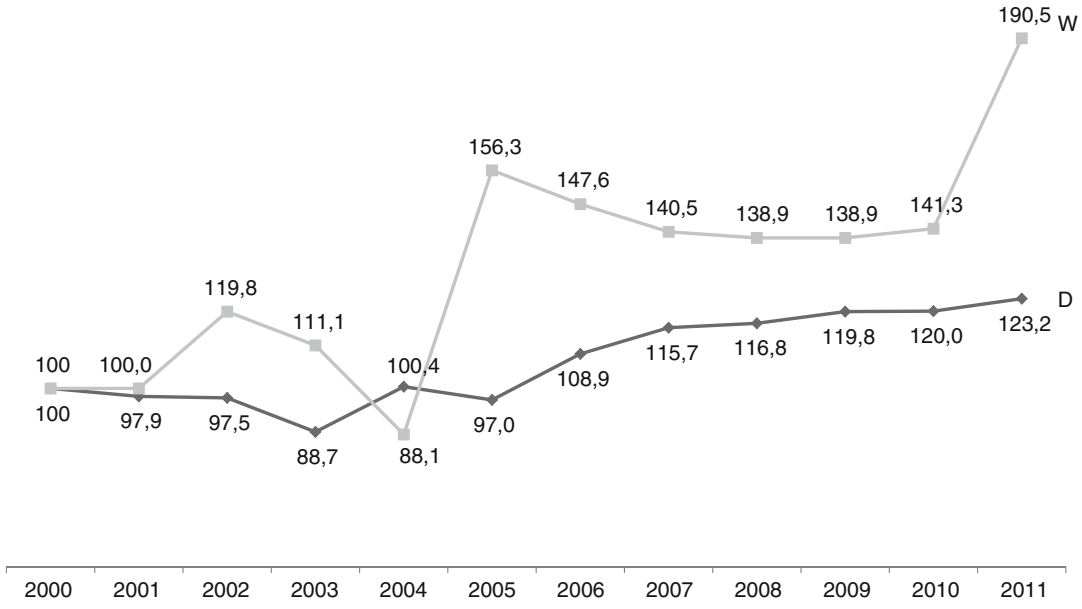
positions in society: elders and people with some form of disability or unique characteristics, such as albinos, for which they are discriminated (Dave-Odigie 2010). These killings often take place in post-conflict and post-disaster settings, or regions burdened by public-health crises. These phenomena are still frequent and rooted in lack of education and opportunities for protection of the weakest elements of the society. Such killings are captured by official statistics in India; according to the NCRB, 240 cases of witchcraft killings were reported in India in 2011. Reports of witchcraft killings have almost doubled over the last decade, with sharp increases between 2004 and 2005 and again between 2010 and 2011 (see Fig. 1). Figure 1 also shows an increase in reports of dowry deaths, the characteristics of which are described below.

Available statistics on ritual killings published by the Uganda Police Force account for 29, 14, and 8 ritual killings for 2009, 2010, and 2011, respectively (Uganda Police Force 2010, 2011). According to the Uganda Police, the remarkable decline in ritual killings was achieved against some serious challenges, including that many people still believe in witchcraft and practice rituals and some quack healers demand human body parts for their rituals (Uganda Police Force 2011, p. 10). Given the above-mentioned impact of underreporting and deficiencies in the recording systems, it may be estimated that the incidence of such killings is actually higher.

The most recent Report of the Special Rapporteur on violence against women notes the occurrence of 42 cases of killings of women due to accusations of witchcraft in Zimbabwe and other 500 in Papua New Guinea (United Nations 2012, p. 11).

"Honor" Killings

"Honor killings can be understood as an extreme result of the combination of patriarchal dominance over women and their sexuality, rigid behavioral norms, and the importance of honor for social relations in economically and socially backward, agrarian societies" (Oberwittler and Kasselt 2011). "Honor" killings exist as a mitigating circumstance in many countries/territories. For example, in 6 Mexican States out of 32 (Michoacán, Baja California Sur, Chiapas, Jalisco, Yucatán, and Zacatecas) "femicide for honor reasons" is sanctioned with sentences between 3 days and 5 years imprisonment (Chouza 2012). The perpetrators of such killings are convinced they act to safeguard the "honor" of men and families to remedy inappropriate behaviors or shameful incidents, most frequently committed by women and girls. The reasons behind killings include adultery, the choice of



Lawful Killings, Fig. 1 Trends of selected forms of "lawful" killings in India: dowry and witchcraft-related killings, 2000–2011 (index: 2000 = 100) (Source: NCRB 2000–2011)

a partner, seeking divorce, and also homosexuality, bisexuality, and transsexuality. In some cultures, when a woman is the victim of rape, this is considered to bring shame to the family and victims may be killed in the belief that this will restore the lost "honor."

The clash between different cultural values within the same country or the adaption of some members of one specific community to the "new" cultural context could be one reason for "honor" killings. These issues have been analyzed by Chesler (2010, pp. 4–5) in her study on 230 victims of honor killings in North America, Europe, and 14 countries in the Muslim world (Afghanistan, Bangladesh, Egypt, Gaza Strip, India, Iran, Iraq, Israel, Jordan, Pakistan, Russia, Saudi Arabia, Syria, Turkey) between 1989 and 2009. The results of this study demonstrated that "worldwide 58 % of the victims were murdered for behaving 'too Western' and/or for resisting or disobeying cultural and religious expectations." Indeed, since the process of adaptation to different cultures can be perceived as dishonorable by the victim's family, immigrant communities seem to be vulnerable to the problem of "honor" killings to the extent that the risk of being killed in the name of "honor" is higher among immigrant communities in the "Western world" than it is in the countries those immigrants come from (Luopa 2010, p. 7).

However, there is no specific cultural or local connotation for "honor" killings. For example, a study on 78 cases in Germany showed that "in 80 % of the cases an unwanted love affair by a woman, outside or after marriage, was the main reason for the homicide, whereas a desire to live an autonomous 'Western' lifestyle was the only central factor in very few cases." This study also demonstrated that "honor killings frequently occur in the context of 'arranged marriages', either when young women violate the norm that their partner will be chosen by the family or when married women want to escape from an unbearable relationship which is the consequence of an arranged marriage." Moreover, two-thirds of these homicides were committed in families of Turkish or Kurds origins, by first-generation immigrants, without Germany citizenship (Oberwittler and Kasselt 2011, pp. 2–3).

A recent study shows that in Italy, 127 women were killed by an intimate partner or former partner during 2010. Of these 70 % of victims and

76 % of offenders were Italians and the motives of killings included conflict in the relationship, men's unemployment, and "honor" (United Nations 2012, p. 8, Karadole and Pramstrahler 2011). The occurrence of "honor" killings in countries where "honor" crimes are not supposed to exist implies that these killings are likely to be recorded as domestic violence, thus limiting the knowledge on the real nature and extent of the phenomenon (see Table 1). The Council of Europe has expressed concern about the increase in the frequency of "honor" crimes and the insufficiency of adequate recording of their occurrence (Council of Europe 2003), which lead to progressive raising of awareness of the scale and the dynamics of the problem and reviewing cases (for example, a national review of nearly 120 cases of murder in the UK lead to the identification of at least 13 cases of suspected "honor" killings).

Reliable data are lacking. In 2003 the UN Population Fund estimated that approximately 5,000 women and girls are killed in "honor killings" every year in the world. According to the last report by the UN Special Rapporteur on violence against women, "honor killings take many forms, including direct murder; stoning; women and young girls being forced to commit suicide after public denunciations of their behavior; and women being disfigured by acid burns, leading to death" (United Nations 2012, p. 12;).

Dowry Deaths

Dowry-related killing is a practice related to religious and cultural traditions of South Asian countries; antidowry laws have been enacted in India (1961), Pakistan (1976), Bangladesh (1980), and Nepal (2009) (United Nations 2012). Indian criminal law describes dowry deaths as follows: "where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within 7 years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death" (304b IPC). The payment of dowry for marriages was abolished in 1961 with the Dowry Prohibition Act; however, the incidence of killings related to dowry is still problematic (see Table 2 and Fig. 1). According to the statistics provided by the NCRB, dowry-related killings have increased by 23 % over the last decade (2000–2011) and dowry represents the fifth motive for murder in India (see Fig. 1 and Table 2). According to official statistics, dowry is the fifth cause of murder. The distribution of these types of killings within India appears patchy as no cases have been reported in 10 regions, while dowry is the main motive for killings in Orissa and West Bengal, accounting for, respectively, 48 and 45 % of identified cases for which a cause was identified in 2011. Despite attempts towards criminalization of "honor" and dowry-related crimes, and removing the right to pledge for mitigating circumstances, these killings are still very frequently considered as "lawful." States responses to these forms of violence often fail in eradicating traditional customs, which frequently also involve police officers and judges who might use a discriminatory and gender-biased approach in applying the law (Luopa 2010).

Conclusions

In conclusion, "lawful" killings represent a hidden form of lethal violence, supported by some consensus and even by law in some cultures, which mostly affects women and other vulnerable groups in the society. A large portion of this violence goes undocumented, a part is recorded but fails to prominently feature in official statistics, which struggle in describing the extent of such phenomena. Beyond violence caused by the hand of husbands to wives, parents to daughters, relatives and community members to persons who are perceived as "different" or having infringed some (frequently unwritten) community laws, there are also many cases of

suicides of women who are unable to find a way out from the psychological and physical abuses suffered.

Capturing the extent of these forms of violence faces both technical and cultural obstacles, as regards general limitations of comparative crime statistics and different understanding on what is to be considered "unlawful" death. In order to enhance the understanding of lethal violence patterns, more efforts should be paid in the recording and classification of the circumstances related to killings, such as, for example, a detailed description of the act/event, the alleged motives for the act, the characteristics of the perpetrator and the victim. The accuracy in the collection of this information is crucial in terms of analysis and policy making at both national and international levels.

Indeed, as stated by the UNODC/UNECE Task Force on Crime Classification (2011, p. 12), "a crime classification at international level, under the principle of exhaustiveness, should cover all possible acts or events that could carry criminal responsibility and sanctions anywhere in the world." Therefore, it would be challenging to understand how to provide an unique interpretation of "honor" killings, dowry deaths, or killing of witches, which in some parts of the world do not imply criminal responsibility and do not carry sanctions.

Related Entries

- ▶ Cultural Criminology
- ▶ Domestic Violence
- ▶ Human Rights Violations in Criminal Court
- ▶ Moral Crimes

Recommended Reading and References

Aebi M et al (2010) European sourcebook of crime and criminal justice statistics – 2010 (4th edn). Boom Juridische uitgevers, Den Haag. Onderzoek en beleid series, no. 241, Ministry of Justice, Research and Documentation Centre (WODC). Accessed on 27 July 2012

Carstens Pieter A (2009) The cultural defence in criminal law: South African perspectives. In: Foublets MC, Renteln AD (eds) Multicultural jurisprudence: comparative perspectives in the cultural defence. Hart, Oxford

Chesler P (2009) Are honor killings simply domestic violence? Middle East Quart 16(2):61–69

Chesler P (2010) Worldwide trends in honour killings. Middle East Quart Spring 2010;17(2):3–11

Chouza P (2012) Feminicidio "por honor". El Pais. http://sociedad.elpais.com/sociedad/2012/03/05/actualidad/1330981386_402961.html

Council of Europe (2003) So-called "honour crimes". Report, Committee on Equal Opportunities for Women and Men. http://assembly.coe.int/Documents/WorkingDocs/doc03/edoc9720.htm

Council of Europe Parliamentary Assembly (2009) Doc. 1193 The urgent need to combat so-called "honour crimes", 8 June 2009

Dave-Odigie CP (2010) Albino killings in Tanzania: implications for security. Peace Stud J 3(1):69–75

Digital Journal (2007) Another mob killing reported from India's Bihar state. http://www.digitaljournal.com/article/231650#ixzz1qENu9NNS

Grosjean P (2010) A history of violence: testing the "culture of honor" in the US South. Mimeo, University of San Francisco. http://www.feem.it/userfiles/attach/201011815184441_Grosjean_paper.pdf

Human Rights Commission of Pakistan (HRCP) (2010) Annual Report. State of Human rights in 2010. http://www.hrcp-web.org/Publications/AR2010.pdf

Human Rights Watch (HRW) (2010) Mob justice in Burundi. Official Complicity and Impunity, United States

Jamaica Constabulary Force (JCF) (2012) Annual major crime statistics review

Karadole C, Pramstrahler A.ed (2011) Femicidio. Dati e riflessioni intorno ai delitti per violenza di genere. Regione Emilia Romagna – Assessorato Promozione Politiche Sociali. http://www.casadonne.it/cms/images/pdf/pubblicazioni/pubblicazioni/femicidio_pdf.pdf

Khan R (2007) Honour-related violence (HRV). In: Scotland: a cross- and multi-agency intervention involvement survey, Internet Journal of Criminology

Liem MCA, Pridemore WA (2012) Handbook of European homicide research. Patterns, explanations and case studies. Springer, New York

Luopa K (2010) State responses to honour killings. Åbo Akademi University. http://www.abo.fi/instut/imr/norfa/Katja%20Luopa%20killings.pdf

NCRB (National Crime Records Bureau) (2000–2011) Crime in India. Ministry of Home Affairs, Government of India, New Delhi

Ng'walal PM, Kitinya JN (2006) Mob justice in Tanzania: a medico-social problem. Afr Health Sci 6(1):36–38

Oberwittler D, Kasselt J (2011) Ehrenmorde in Deutschland. Eine Untersuchung auf der Basis von Prozessakten [Honour Killings in Germany. A study

based on prosecution files] (Polizei+Forschung, Bd. 42, hrsg. vom Bundeskriminalamt). Wolters Kluwer Deutschland, Köln
Odhikar (2012) Human rights report. Odhikar Report on Bangladesh, January
Petrus TS (2009) An anthropological study of witchcraft-related crime in the Eastern Cape and its implications for law enforcement policy and practice. PhD dissertation, Nelson Mandela Metropolitan University, Port Elizabeth, South Africa
Smartt U (2006) Honour killings. Justice Peace 170(7):4–7
Uganda Police Force (2008–2011) Annual crime and traffic/road safety report. http://www.upf.go.ug/Reports/Annual%20Report%202008.pdf
United Nations (2009) Report of the special rapporteur on extrajudicial, summary or arbitrary executions, A/64/187. http://www.extrajudicialexecutions.org/application/media/64%20GA%20SR%20Report%20(A_64_187).pdf
United Nations (2012) Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo. A/HRC/20/16 http://www.ohchr.org/Documents/Issues/Women/A.HRC.20.16_En.pdf
United Nations Office on Drugs and Crime (2011) Global study on homicide, Vienna. http://www.unodc.org/documents/data-and-analysis/statistics/Homicide/Globa_study_on_homicide_2011_web.pdf
UNODC/UNECE Task Force on Crime Classification (2011) Principles and framework for an international classification of crime for statistical purposes. Report to the Conference of European Statisticians
Waters T (2007) When killing is a crime. Lyenn Rienner, Boulder
Welchman L, Hossain S (2006) Honour – crimes, paradigms and violence against women. Zed Books, London

Leadership

► Prison Warden Stress and Job Performance

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► Innovation and Crime Prevention

Learning Theory

► Social Learning Theory

Left Realism

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Overview

Left realism began in the 1980s in Great Britain partially as a reaction to those on the left who felt that talk about street crime was just a racist-fueled media scare. It was an attempt to take back the crime issue from conservatives with progressive socialist analyses and short-term solutions. Left realists felt that lower or working class members were not only the primary victimization targets of street criminals, but were being attacked from above by white collar, corporate and state crime. Rather than automatically rejecting all mainstream analysis, left realists have adopted elements of strain theory and subcultural theories to make their point that absolute poverty is not a cause of crime. Rather, relative deprivation that leads to dissatisfaction with the social order is the criminogenic factor. When such dissatisfied people lack the legitimate means to attain socially approved goals, they may join together in patriarchal, pro-violent subcultures that support their members in criminal activities and in actions to buttress their masculinities (e.g., respect, status) that have been battered by the economic policies of modern governments. The most recent left realist theories, then, which have spread from Great Britain to the United States, Canada and Australia, have added feminist and male peer support elements to concerns for progressive short term solutions.

Introduction

Left Realism can be located on a political map in comparison with so-called "right realism" and "left idealism." Right realism is a

neo-conservative doctrine that attacks mainstream criminological theory, blames the working class for crime, and calls for extensive harsh measures to conduct a war on crime. It has been extremely influential in providing for massive increases in imprisonment at the same time that crime has gone down, and in convincing many police departments to engage in zero tolerance policing that targets minor annoying behaviors on the theory that this will reduce serious crime in its wake. Left idealism was a reaction to such policies on the political left that protested the implicit racism in discussions of street crime and crime statistics. Complaints about working class crime, they argued, as a media and conservative politician-induced scare tactic designed to create a moral panic that would justify oppressive actions against the poor. Rather, these theorists turned their attention on the horrific and harmful practices of corporations, the wealthy and the state.

Left realism, while actually agreeing with these varied claims of the idealists, felt that the primary focus on crimes of the powerful meant rather explicitly that crimes of the powerless or less powerful were being ignored. While idealists often argued that a concern with burglary, robbery and rape was a thinly disguised form of racism, the left realists instead argued that the predatory crimes of the underclass and the predatory crimes of the upper class squeezed the working class in the middle. As primary targets both from above and below, the working class suffers enormous victimization.

Background Description

Left realism had its beginnings in the United Kingdom in the 1980s, among theorists with extensive experience in decrying the power and actions of the law and the state, but partially as a reaction to various theorists on the political left. Jock Young, John Lea and Roger Matthews were upset that the debate over interpersonal and street crime only had two sides. The larger voice consisted of conservatives had no problem playing off racial fears to convince voters to fund a massive war on crime and an extraordinary increase in the use of imprisonment. The only other major voice came from the left, where many were arguing that any concern for street crime was a racist reaction against inner city and minority group members. After all, these people claimed (quite correctly) most of the money stolen in the world was obtained by white collar and corporate criminals, and much of the injury from illegal activities also tended to be caused by these same people through illegal code violations, lack of safety practices in manufacturing and agriculture, and substantial health threatening industrial pollution.

However, limiting the debate to only these two sides, left realists felt, meant that there remained a major problem. City people were hiding behind locked doors, giving up sitting on park benches or their front stoops to meet with their neighbors, not because they were scared that General Electric or Halliburton would rig bids to steal millions in public construction projects. Older people were dying in heat waves after nailing their windows shut despite not having air conditioning, because of a major fear, but certain not because they were afraid that a company like Union Carbide might release poison gas into the atmosphere, as they did in India in 1984. Rather, the crime problems that people in the working class are most worried about are a variety of acts committed by people at the lowest end of the socio-economic ladder. They were afraid of rape, robbery, break-ins and burglary, assault and murder. In opposition to the left idealist notion that crime fear was a social construction based on racist and anti-minority thought, left realism took the position that working class people were being attacked both from above and below. While at the mercy of white collar and corporate criminals for a wide variety of crimes, they were also the primary victims of street criminals such as rapists, car thieves, purse snatchers and armed robbers. Thus, one of the most important early arguments of the left realists was that complaints that the justice system was racially biased (which it was), and that the legal system was put into effect to serve the interests of the upper classes (which it was), still masked the fact that the

primary victims of both violent and economic crimes were lower class and working class people.

Worse, people in the general public had little respect for theorists of the left who belittled the problem of rape or robbery, the object of great fears on their part. Over 20 years ago, American left realist Elliott Currie laid out a crucial concern that completely ignoring intra-class street crime serves to "help perpetuate an image of progressives as being both fuzzy-minded and, much worse, unconcerned about the realities of life for those ordinary Americans who are understandably frightened and enraged" (1992: 91). Ignoring or belittling a concern for street crime and victimization meant handing over the entire issue of street crime to conservative politicians, who had no problem using it to their benefit first to elect their candidates, and then to implement a series of progressively harsher criminal justice policies, such as longer sentences, mandatory sentences, increased imprisonment, reduced defendant rights, and reduced services for rehabilitation or treatment.

These were not the only places where left realism diverged from common positions taken by other theorists of the left. In the first place, left realists made it clear that they did not feel any necessity to be constrained by the dictates of Marxist theory (Hayward 2010). This was not unique on the left, it was still controversial in some quarters when it became an essential element in left realist theory. While explicitly remaining on the left politically, they borrowed any ideas from mainstream criminology that they believed had merit or explanatory power that would advance or help their explanations of criminal behavior. It was much more common then (and to some degree today also) for left-leaning criminologists to reject wholesale any theories that originated in mainstream criminology, for no other reason than the place of their origin. Thus, it was a major divergence from the norm for left realism to adopt some mainstream ideas just because they seemed valuable or had explanatory power. For example, Lea and Young (1984) borrowed extensively from concepts brought into criminology by Robert K. Merton (strain theory) and Albert K. Cohen (subcultural theory). Lea and Young argued that although criminologists have commonly claimed that crime was caused by poverty, one cannot attribute or explain crime solely through absolute deprivation or extreme poverty. There are many cultures where people were much poorer than the poor of the United State or Great Britain on some objective scale (income, standard of living, purchasing power), but these poor people in other cultures as a group committed much less of what is usually termed street crime (e.g., burglary, robbery, rape, assault). Thus, just the state of having a small amount of money – poverty – was not a sufficient explanation for criminal activity. Rather, the left realists said, crime has its roots in "relative deprivation," or the extreme differences between rich and poor that leads to discontent with the political structure. This was particularly true in a context where such people do not see any hope of a political solution. Such people who are frustrated and disempowered by relative deprivation tend to band together – to come into contact with other disenfranchised people, and eventually form subcultures that in many cases encourage or legitimate criminal behavior.

State of the Art

There have been a number of more current left realist perspectives. For example, DeKeseredy and Schwartz (2010) have more recently argued that criminological subcultural development has been strongly influenced in recent years by the destructive consequences of conservative Chicago School economic policies, and by marginalized men's attempts to live up to the principles of hegemonic masculinity in an environment that offers few constructive outlets for men concerned with masculinity to act out this gendered behavior. Without jobs, social structures, organized sports or educational support, marginalized men sometimes find that crime provides one of the few bases of support available to them for gendered behavior. As newer conservative economic models predominate, jobs continue to

be eliminated or exported and salaries for those that remain often cut drastically. Deindustrialization and the drastic decline in family owned farms provide more challenges to young men's masculine identity than ever before, and the addition of the effects of institutionalized racism no doubt contributes to the mushrooming presence of criminal gangs in the United States.

Although many or even most men who are economically marginalized engage in male to male violence as a form of compensatory masculinity, DeKeseredy and Schwartz (2010) argue that others, including those influenced by a patriarchal culture, engage in a variety of forms of male-to-female victimization as an effective means of repairing damaged masculinity (Messerschmidt 1993). Women abuse has become in many violent subcultures a legitimate way of maintaining patriarchal authority and control.

Other left realist perspectives have attempted to explain other problematics. For example, Gibbs (2010) argues that left realist theory is useful in attempts to explain terrorist acts. Economically disenfranchised men not only are a pool from which street criminals are drawn, but they also under certain circumstances join terrorist-supporting subcultures. Thus, she argues, current political "get tough" policies are likely to be just as unsuccessful in fighting terrorist acts as they have been in fighting street crime.

If there is one thing that separates left realist theory from other theoretical perspectives, and particularly mainstream criminology, but also a substantial portion of critical criminology, it is the importance to any theoretical discussion of short-term, anti-crime policies and practices. British left realism has been centrally concerned with criminal justice reform. In the early formulations, it received extensive attention for proposals dealing with the democratic control of policing. The goal was to implement a pattern of minimal policing in areas where local communities were opposed to a heavy police presence, and to oppose such policies as zero tolerance policing. The goal was to locate and implement police reforms that people in a district actually want.

Further, left realists understood that limiting policing suggestions to issues related to the criminal justice system would doom them to failure. To some degree, the criminal justice system is asked to clean up society's messes, caused by problems in low employment, bad housing, poor schools, and cuts in other city services. Left realists have argued that many of these issues are related to crime, and included in their short-term proposals for solutions things that might deal directly with these problems, such as an increase in the minimum wage, and affordable day care. To curb crimes of the powerful, left realists have called for such policies as the democratization of corporations, representative citizen patrols to study complaints of corporate crime, and enforcement of regulatory procedures and mechanisms. Still, this area has not been a major strength for left realists.

Controversies

One of the most potent critiques of left realism, especially in Great Britain, has been the attack that it does not offer a coherent theory of the state (Coleman et al. 2009). For the most part, this has been an attack on the 1980s concept of the Square of Crime, which focused on four interacting elements that can be visualized at the corners of the square: the victim, the offender, state agencies such as the police, and the public. Jock Young explained the relationship (1992: 27):

> It is the relationship between the police and the public which determines the efficacy of policing, the relationship between the victim and the offender which determines the impact of the crime, the relationship between the state and the offender which is a major factor in recidivism.

This conceptualization, it was often argued, was most relevant to inner-city street crime, and less relevant to a broader understanding of various societies and crimes being studied today. Further, the development of the state, while inherent in the square of crime, was not fleshed out in significant detail.

One recent attempt to deal with this problem came from Roger Matthews (2009) who

published a refashioned left realist theory that prioritizes the state and views it as one of the "fundamental organizing concepts that provide the conceptual frameworks through which we make sense of the social world" (2009: 346). Matthews developed an extensive call for linking theory, method and intervention in his re-energized left realist theory. However, this is a single author, and certainly much more extensive work on this subject needs to be done.

As mentioned, one of the central features of left realism is that the main architects did not feel constrained by traditional leftist theory, and in fact took their influences from any source they felt advanced explanatory power or knowledge. Unsurprisingly, then, there has been considerable controversy on the left among those people who are in fact bound to traditional Marxist or other leftist structures, and find that any incorporation, integration or use of theories developed by mainstream theorists to be a sign of right-wing tendencies. Thus, to give just one example, Jock Young's use of such mainstream concepts as strain and subculture to attempt to harness a left realist explanation earned him what Yar and Penna (2004) no doubt viewed as their ultimate insult: he was labeled a "positivist" for using a politically incorrect theory. Others on the left have similarly attacked left realism for being politically incorrect, rejecting the claim of the left realists that they are engaged in socialist analysis. Similar attacks were made on left realists for their use of social science data collection such as victimization surveys to develop information to inform their theories.

Another strong controversy in England was the series of attacks from the left from people who believed that short-term solutions that fix problems with the police only plays into the hands of the state. After all, critical changes that make people happy with the police are proposed and implemented, then they will turn their attention away from other issues that might fuel their discontent. This improvement of such things as the police ultimately will only strengthen the existing power structure (e.g., Jamieson and Yates 2009). An alternative formulation of this notion is that the state, the legal system and the criminal justice system are all part of an overarching system that makes any efforts at reform end up as mere tinkering with the inside structures and ultimately meaningless. Left realists, on the other hand, have always believed that ignoring street crime and policing problems while waiting for the outcome of the eventual revolution means ignoring and condemning the women and men who are the victims of both street criminals and also the overzealous activities of some police forces. Any delay in making reforms just means that more lives will be destroyed by criminal or police action. Thus, one of the major contributions of left realists was to argue that it was possible to be a complete realist while at the same time pushing for left-oriented progressive solutions to crime. They argued that it is a legitimate goal to "chip away" at the capitalist patriarchal order, rather than holding off to await the success of some policy to overthrow all of society's structures. Of course, there are many who see this lack of support for the revolution as a serious flaw in left realism.

There have been sharp attacks on left realism for ignoring crimes of the capitalist order. Of course, those criminologists that were called left idealists here were heavily focused on corporate and state crime, and they obviously felt that such a focus was important. However, as also made plain in this essay, from the beginning one of the central tenets of left realist thought was that members of the working class were victimized from above (white collar, state and corporate crime) as well as below (street crime). Further, there were a series of important works those arose from left realist theory on corporate crime in the 1980s and 1990s. Yet, there is no question that the primary focus of left realists was to correct the imbalance of looking only at state and corporate crime, and ignoring the victimization of people by street criminals.

The other area of major attack on left realism has been the argument that some of the theorists have been gender blind. There is some truth to the argument made by some feminist critics that the earlier left realists, and even some of the more recent formulations, are not particularly sensitive to the unique problems of women, although

certainly much left realist analysis affected men and women equally. It is not unfair to call them gender blind, as they were indeed more directed toward issues that were of major import to men, such as bar fights and police harassment of young men. Still, left realists were some of the first to recognize the importance of gendered issues. One of their most famous tools, the local victimization survey such as the Islington Crime Survey, was developed specifically to look at measures often seen as gendered, but ignored by most victimologists, such as fear of crime, avoidance behaviors on the streets, sexual harassment, and injury from rape or domestic violence. Still, early left realism was not strong on issues related to how patriarchal structures affected not only women's victimization but women's criminal patterns. More recently, left realists have begun to look at some of these issues, such as violence against women in a global perspective (Currie 2008), and a gendered subcultural theory that deals with violence against women (DeKeseredy and Schwartz 2010).

Although there are numerous places where left realist theories were used to study violence against women, one fertile area has been the study of male peer support as a form of subcultural behavior. In particular, men who use violence against women as a method of repairing damaged masculinities, or in an attempt to maintain and uphold patriarchal structures, often have subcultural male peer support for their actions. A variety of studies have found a relationship between the extent of male violence against women, and the amount of time that such men spend with their male friends, and indeed the amount of commitment these men have toward maintaining these male peer support structures. In particular, drinking alcohol with such friends seems to be related to such male violence. In a national representative sample of men, Schwartz, et al. (2001) found that men who went out drinking two or more times a week, had male friends who offered them support for the emotional abuse of women, and offered support for the physical abuse of women, were ten times as likely to sexually abuse women as men who did not have such friends or drinking patterns.

Another recent left realist approach was developed by Dragiewicz (2010), who attempted a left realist explanation for the existence of the anti-feminist fathers' rights group activism. Such groups have been active in arguing that women are as violent as men, and are politically active in fighting any legislation proposed to reduce violence against women, and in fighting attempts to make men responsible for child support payments. Dragiewicz argues that which such group members are not socioeconomically marginalized by the usual standards, but that they experience divorce and child support as socially and economically marginalizing. She argues that "These marginalized men seek out like-minded peers in person and online, drawing upon and adapting mainstream discourses around families, violence, and gender to reassert patriarchal masculinity in the face of challenges" (Dragiewicz 2010: 205).

Conclusion

Criminal justice policy and government policy in general have been trending further and further to the right over the past 30 years. Even in the United States when Democrats have been elected to the presidency during that time, they have engaged in policies that incorporated a great deal of the current conservative thinking, in what Elliott Currie has termed "progressive retreatism." In general, the entire fight against crime has been ceded to the right, and many observers on the left have limited themselves over the past 30 years to sitting on the sidelines and carping.

DeKeseredy and Schwartz (2012) have issued a call for left realists to do even more to publicize solutions, form alliances with progressive community agencies, and in general to translate left realist ideas into action steps. Currie (2008: 117) suggested that: "the choice is stark and simple: We can either let the process continue and fortify outselves against it, with more gated communities and more prisons, or we can decide that it is not tolerable and work to change it. What we cannot do is pretend we don't know it's happening."

Related Entries

- Anomie and Crime
- Cultural Criminology
- Feminist Criminological Theory
- Marxist Criminology
- Police Legitimacy and Police Encounters

Recommended Reading and References

Coleman R, Sim J, Tombs S, Whyte D (2009) Introduction: state, power, crime. In: Coleman R, Sim J, Tombs S, Whyte D (eds) State, power, crime. Sage, London

Currie E (1992) Retreatism, minimalism, realism: three styles of reasoning on crime and drugs in the United States. In: Lowman J, MacLean BD (eds) Realist criminology: crime control and policing in the 1990s. University of Toronto Press, Toronto

Currie E (2008) The roots of danger: violent crime in global perspective. Prentice Hall, Upper Saddle River

Currie E (2010) Plain left realism: an appreciation and some thoughts for the future. Crime, Law Social Change 54:111–124

DeKeseredy WS, Schwartz MD (2010) Friedman economic policies, social exclusion, and crime: toward a gendered left realist subcultural theory. Crime Law Social Change 54:159–170

DeKeseredy WS, Schwartz MD (2012) Left Realism. In: DeKeseredy WS, Dragiewicz M (eds) Handbook of critical criminology. Routledge, London

Dragiewicz M (2010) A left realist approach to antifeminist fathers' rights groups. Crime Law Social Change 54:197–212

Gibbs JC (2010) Looking at terrorism through left realist lenses. Crime Law Social Change 54:171–185

Hayward KJ (2010) Jock Young (1942–). In: Hayward KJ, Maruna S, Mooney J (eds) Fifty key thinkers in criminology. Routledge, London

Jamieson J, Yates J (2009) Young people, youth justice and the state. In: Coleman R, Sim J, Tombs S, Whyte D (eds) State, power, crime. Sage, London

Kinsey R, Lea J, Young J (1986) Losing the fight against crime. Blackwell, Oxford

Lea J (2010) Left realism, community and state building. Crime Law Social Change 54:141–158

Lea J, Young J (1984) What is to be done about law and order? Penguin, New York

Matthews R (2009) Beyond "so what?" criminology. Theor Criminol 13:341–362

Messerschmidt JW (1993) Masculinities and crime: critique and reconceptualization. Roman & Littlefield, Lanham

Pearce F, Tombs S (1992) Realism and corporate crime. In: Matthews R, Young J (eds) Issues in realist criminology. Sage, London

Schwartz MS, DeKeseredy WS (1997) Sexual assault on the college campus: the role of male peer support. Sage, Thousand Oaks

Schwartz MD, DeKeseredy WS, Tait D, Alvi S (2001) Male peer support and routine activities theory: understanding sexual assault on the college campus. Justice Quart 18:701–727

Yar M, Penna S (2004) Between positivism and postmodernity?: Critical reflections on Jock Young's the exclusive society. Brit J Criminol 44:533–549

Young J (1992) Ten points of realism. In: Young J, Matthews R (eds) Rethinking criminology: the realist debate. Sage, London

Legal Control of the Police

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Overview

Police officers are granted immense authority by the state to impose harm. They walk into houses and take property. They stop and detain individuals on the street. They arrest. Sometimes they kill. The problem of policing the police is how to regulate police officers and departments to protect individual liberty and minimize the social costs the police impose while allowing them to do what is necessary to achieve the ends of policing: reducing fear, promoting civil order, and pursuing criminal justice. Constitutional law as interpreted by the United States Supreme Court provides the most well-known check on police conduct. In addition, many other federal, state, and local statutes, constitutional provisions, court decisions, and administrative regulations also govern the police. Since federal constitutional law cannot alone ensure that the benefits of policing are worth the harms it imposes, this participation by other government actors is essential to ensure adequate regulation of the police. However, the laws that presently govern the police are not tailored to balance the individual and societal interests at stake when police officers act, they lack coordination, and responsibility

for regulating the police is haphazardly allocated. As a result, the present array of laws that polices American policing does not promote law enforcement that is maximally effective and protective of civil rights.

Policing the Police Through the Courts and Constitution

Constitutional law has long been a central component of legal efforts to police the police. In the early 1960s, under the leadership of Chief Justice Earl Warren, the United States Supreme Court authorized broad new remedies for violations of federal constitutional rights by local police. First, in 1961, in *Monroe v. Pape*, the Court interpreted 42 U.S.C. § 1983, a long-standing civil rights statute, to permit civil liability for police officers who violated federal rights even if those officials also violated state law. Later the same year, in *Mapp v. Ohio*, the Court imposed the exclusionary rule on states, mandating that state courts – like federal courts – exclude from state criminal trials evidence obtained in violation of the US Constitution's Fourth Amendment ban on unreasonable searches and seizures. These decisions gave victims the incentive and means to challenge police conduct, the courts the opportunity to refine constitutional doctrine, and the police new reasons to comply with constitutional norms.

A few years after the Court broadened remedies for constitutional violations by the police, it expanded the constitutional standards that set limits on police conduct. In *Katz v. United States* and opinions following it, the Supreme Court eliminated technical requirements that previously limited the scope of the Fourth Amendment, reframed Fourth Amendment analysis to bring a broader array of police practices within the Amendment's ambit, and emphasized the importance of warrants issued by neutral magistrates as a means of ensuring the constitutionality of police activity. In *Miranda v. Arizona* and its progeny, the Court applied the Fifth Amendment privilege against self-incrimination to police interrogations and imposed prophylactic rules and an exclusionary remedy to protect suspects during those interrogations. Like *Katz*, *Miranda* subjected additional police activity to judicial review, and, like *Mapp*, the case increased incentives for litigation and police compliance. Through these cases, the Court firmly established constitutional law as an important mechanism for regulating the police.

While the Supreme Court's doctrines have changed over time, its enterprise has not. Since 1968, the Court has considerably loosened the constraints on the investigation and detection of crime imposed by the Fourth and Fifth Amendments, substantially narrowed the scope of the exclusionary rule, and, after expanding § 1983 liability significantly in the 1970s, contracted liability in more recent decades. Even so, the paradigm arising from the Warren Court doctrines remains largely intact. Courts continue to apply the Fourth Amendment and the *Miranda* doctrine to impose detailed regulations governing police searches of homes, cars, and people and defining the procedural protections defendants are entitled to during custodial interrogations. Moreover, courts continue to require exclusion of evidence and to permit civil liability to remedy civil rights violations by the police. Thus, courts continue to delimit and protect constitutional rights through criminal cases and civil suits.

Although the judicial enterprise of defining and enforcing constitutional rights is and has been for many decades an important means to regulate the police, the judiciary cannot alone effectively prevent police misconduct, and the policy problem policing presents is not limited to constitutional rights. Courts suffer systematic limitations that inhibit them from undertaking the complex analysis of policing that effective regulation of the police demands, and constitutional rights are structurally unable to balance fully the harm police conduct imposes against its beneficial effects. Consequently, while courts and the Constitution play an important role in regulating the police, the judiciary and the Constitution can never successfully address the problem of policing without assistance.

Fourth Amendment doctrine makes apparent some of the limitations of courts. When courts evaluate whether a police search or seizure is

"unreasonable" and therefore unconstitutional, courts frequently must appraise the nature of the intrusion on the individual, the strength of the government's interest in the intrusion, and the consequences for law enforcement of various possible rules and then balance these interests against each other. Assessing these considerations requires courts to draw factual conclusions about matters beyond the circumstances of the particular case, such as whether law enforcement can achieve its ends by alternate means. Similarly, when courts seek to interpret the exclusionary rule and civil remedies to prevent future constitutional violations by police officers, they do so based entirely on the likely effects of doctrines on police behavior. Thus, in order to tailor remedies to encourage lawful police behavior, courts must make correct judgments about what police officers value and how particular legal decisions are likely translate into incentives for them.

Although courts can define and vindicate constitutional rights only if they are capable of these kinds of empirical assessments and predictive analyses, they are notoriously ill suited to these tasks. For one thing, courts act with grossly inadequate data. Most Fourth Amendment questions are contested in state criminal cases in which neither party is likely to have adequate resources or incentives to effectively litigate significant empirical questions, and even a civil plaintiff hoping for compensation after a violent arrest cannot cost-effectively litigate many matters. As a result, courts deciding constitutional criminal procedure matters have no effective mechanism to obtain evidence about policing and incorporate it into their normative judgments. Even when courts are able to engage in effective empirical analysis, they have little opportunity or ability to adjust a doctrine as the facts and social science underlying it evolve, since they are bound by precedent and limited to deciding questions presented by the cases before them. As a result, courts have systematic difficulty formulating effective rules for the police and structuring remedies to prevent constitutional violations.

Even if courts could overcome these barriers, a major objective of police regulation would still remain beyond their reach. Ideal regulation of the police would take into account considerations such as how harmful any police action is to individuals and communities, as well as how it compares to other means of producing law and order in terms of cost, harm, effectiveness, and officer safety, in order to specify the conditions under which the police should harm individual interests for the greater good. If courts regulate the police, then the legal problem of policing is limited to constitutional violations. Constitutional rights are, however, ill suited to balance societal interests in law enforcement and individual freedom.

While constitutional rights accommodate both individual and societal interests, the well-known process by which constitutional rights are articulated and enforced dictates that rights provide only a limited tool for shaping police conduct. First, rights establish only minimum standards for law enforcement. Because individuals assert rights against the police rather than the other way around, constitutional criminal procedure rights are always framed as a ceiling on government action. They thus cannot reflect a full analysis of how to balance competing interests when the police enforce the law and individuals are harmed. Constitutional criminal procedure rights are therefore commands about what the police *cannot* do, not standards for what they *should* do. Second, because constitutional criminal procedure rights set unbreakable rules for police officers in advance, the rights themselves must be defined to permit law enforcement flexibility in pursuing societal aims even if this produces societally undesirable results in individual cases. That is, the "ceiling" set by constitutional rights must be higher – more generous to law enforcement – than would result from a full balancing of the interests at stake. Third, because rights are held and enforced by individuals, usually with respect to specific actions, they do a poor job of measuring aggregate costs and benefits of law enforcement activity. Intrusions by the police, such as stopping and frisking pedestrians to investigate crimes, may be constitutionally justified, and yet when multiplied thousands or hundreds of thousands of times, those

intrusions may impose total costs that substantially undermine the quality of life in a community in a manner the Constitution cannot check.

Because of these characteristics, constitutional rights are structurally incapable of encouraging law enforcement to impose only necessary, fair, and efficient harms on legitimate interests in privacy, equality, autonomy, and the like. Instead, the Constitution provides only a rough measure of whether police conduct is justified. Adequately protecting individual and communal interests therefore requires nonconstitutional regulation of the police.

The Law of the Police

Government actors other than the courts, using legal tools other than the Fourth and Fifth Amendment, already create, empower, influence, and constrain the police and those that supervise them. There exists a vast web of law regulating the police, which can be divided into four categories: (1) law that authorizes or restricts the conduct in which police may engage; (2) law that remedies, punishes, or disincentivizes violations of the first category of law; (3) law that governs the hiring, management, and organization of police officers and departments; and (4) law that governs the availability of information about police activities.

Laws Authorizing and Restricting Conduct

Laws that regulate police conduct come from sources ranging from the Vienna Conventions on Consular and Diplomatic Relations, which limit police power to engage in searches, seizures of property, and arrests involving diplomats, to a San Francisco ordinance that prohibits police officers from questioning people about immigration status. Federal law, for example, contains more than a dozen statutes that regulate police searches, electronic surveillance, and access to private information. These statutes range from Title III, which governs federal wiretaps, to the Health Insurance Portability and Accountability Act, which restricts law enforcement access to and use of medical records. And federal law concerning the police is not limited to statutes governing searches and seizures. For instance, the Illegal Immigration Reform and Immigrant Responsibility Act provides for local police enforcement of federal immigration law, and the Law Enforcement Officers Safety Act allows qualified active and retired law enforcement officers to carry a concealed firearm anywhere in the United States, even if forbidden by state law. In addition to federal statutes, federal constitutional doctrines outside of the Fourth Amendment and *Miranda* also affect the police. Most notable among these, the First Amendment limits the conditions under which police officers may make arrests for breach of the peace, disorderly conduct, and resisting arrest. As these examples suggest, federal regulation of police conduct beyond constitutional criminal procedure doctrine is considerable.

State constitutions, statutes, and regulations regulate police conduct even more extensively. Local police officers are created by state law, which both grants power to police officers and restricts its exercise. Thus, state statutes permit police officers to engage in community caretaking and criminal law enforcement, allow officers to use force, require police to aid citizens in limited circumstances, mandate that officers arrest suspects in domestic violence cases, and forbid the police from asking questions unrelated to the subject of a traffic stop, for example. State constitutional law frequently mirrors federal law, regulating searches, seizures, and interrogations, but it is often interpreted more expansively to control police behavior that is beyond federal constitutional protection. Local ordinances further restrict police conduct, limiting the use of race in police actions, for example. Finally, departmental administrative rules – often known as general orders – provide the most important and extensive guidance to police officers about what they must, may, and may not do.

Laws to Remedy and Punish Violations

The second category, laws that provide remedies for violations of rules governing police conduct, includes federal constitutional decisions mandating that evidence illegally obtained by the police

be excluded from federal criminal trials, as well as federal statutes that authorize criminal prosecution and private civil suits against local officers, departments, and municipalities. States provide similar remedies that supplement federal law, including statutes authorizing criminal prosecution, evidentiary exclusion, civil suits for damages and other relief, and sometimes, structural reform of departments. States, municipalities, and departments themselves often also provide other remedies, without analogs in federal law, for police conduct that is unconstitutional, illegal, or merely against administrative regulations. For example, most states authorize revocation of police officer certification for some kinds of misconduct, which prevents officers from reentering law enforcement in the same state. Municipalities frequently provide for civilian review of citizen complaints concerning police misconduct. And internal administrative rules within police departments establish procedures for taking, investigating, and resolving complaints and impose punishments for misconduct, often through an internal affairs unit. These internal administrative processes provide the most commonly used remedy for misconduct and, in many jurisdictions, are also subject by local ordinance, charter amendment, or public referendum to external review by an auditor or civilian oversight agency.

Laws Governing Hiring, Management, and Organizational Requirements

Some of the most important rules and laws governing the police are laws that set standards for hiring, training, and managing police officers. Policing is usually organized as a function of municipal or county government. Municipal ordinances, city charters, and other local laws dictate matters such as who hires and fires the police chief and thus often who ultimately controls policy in the police department. Although local governments largely oversee policing, federal and state laws check local political control of the police.

For example, every state has a peace officer standards and training commission ("POST") that establishes minimum qualifications and training requirements for police officers as well as a process for licensing them. These commissions control how old and how educated police officers must be and what kind of criminal record they can have, factors that may affect whether officers are likely to engage in misconduct. They regulate the hiring process for officers, including whether officers must pass psychological or medical screening. Finally, they are the primary determinant of what kind and how much training police officers receive.

Other statutes affecting the police may impose less direct standards of police qualifications. The Lautenberg Amendment to the Gun Control Act of 1968, for example, changed federal gun laws to prohibit individuals convicted of misdemeanor domestic violence crimes from possessing a firearm. The Gun Control Act also applies the prohibition to those subject to a restraining order or dishonorably discharged from the military. As a result of this law, individuals in these categories cannot serve as sworn police officers in most jurisdictions, even if state law would otherwise allow them to serve. These federal requirements also affect the size of the pool of potential officers as well as who becomes an officer and therefore constitute one more piece of the web of laws that governs American policing.

In addition to laws mandating qualifications and training for police officers, federal and state laws constrain the organization of police departments and management of police officers. Federal law imposes constraints on how police officers are hired and fired through statutes and constitutional doctrines that prohibit employment discrimination. In addition, federal laws influence how officers are managed: The Fair Labor Standards Act, for example, influences when police work, including how shifts are structured to address overtime thresholds, a major financial and administrative issue for police departments. And the Fifth Amendment privilege against self-incrimination has a distinctive application to government employees that frequently restricts the use of statements compelled in administrative investigations of police officers against them in criminal prosecutions. State law is even more significant. State laws and regulations do everything from authorizing the existence of police

departments to setting qualifications for the police chief. And state employment and labor laws, including civil service law, collective bargaining law, employment discrimination law, and law enforcement officer bills of rights, constrain most employment decisions by police departments and local governments.

Laws Governing Information About the Police

Finally, a variety of state and federal laws govern the production and distribution of information about the police. Most of the information that exists about policing is collected by police officers themselves pursuant to internal administrative policies demanding that officers complete form reports about arrests, uses of force, responses to citizen calls, and other interactions with the public. Other information is produced by departmental practices, such as installing video cameras in police cars or recording interrogations that occur at the station house. While these local practices are driven in significant part by departmental concerns, external legal constraints on departments influence them substantially. Thus, a department may collect data about the race of those targeted in traffic stops to fulfill the terms of a lawsuit settlement over racial profiling or in response to a local ordinance or state law. Of course, internal policies and state and local law can inhibit as well as facilitate the production of information about policing. Some departments collect little information on daily police activities, a practice that makes scrutinizing those activities difficult. And some states have applied laws governing recorded communications to prohibit private citizens from videotaping or audiotaping their interactions with the police.

Access to information about police conduct is often similarly shaped by a combination of departmental practice, state law, and civil settlements. State statutes and rules of civil and criminal procedure mandate government disclosure of some kinds of information about police conduct and departmental policies to civil plaintiffs and criminal defendants. Open records laws permit the broader public to obtain some information about police departments and their management, and some states expressly require departments to collect and disclose data about policing. But many states restrict public access to data about police misconduct, either through generally applicable statutory exemptions, such as exemptions for personnel records or for criminal investigations, or through specific exceptions for law enforcement. As a result, for example, internal disciplinary records and citizen complaints against an officer can be unavailable to the public, limiting political accountability for police practices.

Weaknesses of the Law Governing the Police

As this description suggests, local, state, and federal actors use a range of legal mechanisms to influence policing. Although this participation by institutions other than courts and regulation outside constitutional law is essential to effective governance of the police, the existing web of laws governing the police has arisen organically, the product of institutional arrangements and historical contingencies that have little to do with policing. As a result, these laws are often not tailored to serve the end of making law enforcement worth its costs, they are inadequately coordinated to promote efficient police practices, and responsibility for generating and enforcing them is haphazardly allocated among governmental institutions. As result, American policing does not fully ensure that police effectively control crime, fear, and disorder without imposing unjustifiable and avoidable costs on individuals and communities, despite extensive legal regulation.

First, existing law is not well designed to promote harm-efficient policing and cannot easily be made to do so. Legal regulation of the police should promote harm-efficient policing – that is, policing that imposes harms only when, all things considered, the benefits for law, order, fear reduction, and officer safety outweigh the costs of those harms. Presently, harm efficiency is largely left to the local political process, and police departments and local and state governments already take it into account in governing policing,

at least to some degree. Some departments adopt, for example, internal regulations forbidding consent searches without reasonable suspicion of criminal activity, even though constitutional law demands no individualized suspicion before requesting consent to search. Nevertheless, public debates about police practices often focus on whether their conduct is constitutional or effective, not whether it is harm efficient, distracting political actors from this central question. Moreover, in order for regulatory actors to promote harm-efficient means of policing, they must have a basis for doing so, including an account of what the relevant harms and benefits of policing practices are and empirical work measuring and comparing harms and policing efficacy. Presently, however, insufficient data is collected about policing to provide the basis for harm analysis, and no substantial academic literature exists that can be used to compare policing techniques with respect to both effectiveness and harm. Until regulators mandate the necessary data production and collection, and scholars lay the conceptual and empirical groundwork for understanding harm efficiency, institutional actors will be stymied in their efforts to regulate the police toward this end.

Second, existing laws regulating the police interact in ways that may undermine the goal of ensuring that policing practices adequately protect individuals and communities. For example, courts have tailored civil remedies for unconstitutional policing to encourage departmental reforms likely to reduce misconduct, such as careful hiring practices and adequate training and supervision of police officers, but these judicial efforts cannot achieve their aim because state collective bargaining and civil service laws create countervailing incentives discouraging departments from implementing the same reforms. In a majority of states, civil service laws heavily regulate the treatment of public employees, including police officers. These laws allow costly legal battles when police departments demote, transfer, or fire an officer and thus impose significant additional costs on police departments trying to manage officers who commit misconduct. They therefore disincentivize precisely the same conduct that civil remedies are intended to encourage. Collective bargaining rights similarly deter department-wide changes intended to prevent constitutional violations. In states that mandate collective bargaining before a department changes its disciplinary process or promotion standards, departments face significant additional costs for increasing internal accountability for police officers, a key means of preventing police misconduct.

As these examples suggest, departments enter a legal minefield whenever they take employee action or make new policies. This is not to say that we should eliminate civil service laws or collective bargaining: These laws have complicated goals and effects that go beyond facilitating harm-efficient policing. Nor does it mean that civil remedies should not be used to incentivize reform. But until courts and legislatures consider the interactions among the myriad laws governing the police, legal efforts to regulate the police may not promote effective reform.

Third, although police departments, local governments, states, and the federal government all influence police conduct, as the example of the courts suggests, government institutions are not equally well suited for the tasks governing the police demands. Courts cannot, for example, determine the consequences of the real-world trade-offs between effective policing and individual freedoms that policing puts at stake. Regulating policing effectively therefore requires allocating institutional responsibility for regulating the police and choosing the best legal mechanisms for influencing police conduct. The existing allocation of responsibility and existing choice of mechanisms are unlikely to serve the goal of effectively regulating the police because they reflect historical and political contingencies rather than a considered choice about the best institutional approaches to regulation of the police. Unfortunately, reassigning responsibility for regulation to institutional actors with adequate capacity and incentive to ensure that the communal benefits of policing are worth its costs to individuals and communities cannot be done easily.

Police departments have enormous influence over the conduct of police officers, but they are

nevertheless imperfect regulators of policing. Departments have difficulty engaging in broader causal analysis about how effective and harmful alternative law enforcement practices are. Moreover, police chiefs and local political actors lack sufficient incentive to ensure that individual interests are adequately vindicated in policing, because they are usually better rewarded for maintaining order and reducing crime than for protecting civil rights of the minority of residents targeted by police activities. Thus, police departments and local governments cannot be counted on to produce consistently harm-efficient policing.

Although states are critical in shaping police conduct, much of state regulation governing the police is aimed solely at ensuring law enforcement effectiveness rather than balancing effectiveness and civil rights. In addition, state law provides numerous mechanisms for remedying misconduct, but they seem uniformly weak. This state of affairs suggests that state actors have inadequate incentives to promote harm-efficient policing.

Thus, while local and state actors already promote civil rights to some degree and they could do so more, they likely cannot be expected to take adequate account of individual constitutional rights and constitutional interests that extend beyond them: They cannot and do not have sufficient reason to reach the appropriate trade-offs between effective policing and individual freedoms.

By contrast, federal actors can engage in thorough analysis about how to reduce harms to constitutional interests while engaging in effective law enforcement and may be able to encourage local and state action toward these ends. Congress already plays an active role in regulating the police. It has long regulated some police uses of private information deferentially regulated by the Court. It funds the Department of Justice's significant civil rights efforts, including criminal prosecution of abuses by local law enforcement, funding for nonprofits that promote civil rights in law enforcement, and technical assistance to police departments. And it is responsive to change: After court decisions restricted federal civil suits for injunctive relief against police departments, Congress passed 42 U.S.C. § 14141 authorizing the Department of Justice to bring suits for equitable remedies against police departments that engage in a pattern or practice of unconstitutional misconduct.

Though federal actors are capable of regulating the police, congressional attention to civil rights is piecemeal and irregular, and federal intervention in policing has long been politically controversial. Congress has not yet required even mandatory data reporting for local police departments, though the need for such data as a foundation for the regulation of the police is obvious, and though this could easily be carried out by existing Department of Justice components. More comprehensive regulation of the police, including the administrative analysis of the consequences of alternative law enforcement practices for individual and societal interests, is therefore unlikely and in any case may not justify its costs. As this analysis suggests, reaching a combination of government institutions with both the ability and the motive to regulate police officers and police departments effectively represents an ongoing challenge to efforts to ensure that police practices are carried out to promote law and order while minimizing harm.

Conclusion

The police have always represented both hope and harm. They contribute to social order but also threaten it. Though courts can judge the moral and historical imperatives that underlie constitutional rights, they cannot assess conditions on the ground or predict the consequences of legal rulings on civil rights and law enforcement. The project of defining and protecting constitutional rights inevitably requires input from other institutional actors. Although other government institutions have long participated in regulating the police, these efforts cannot approach ideal regulation of the police. First, political actors lack sufficient incentive and an adequate basis for determining when law enforcement should harm individual interests for societal

ends, given the risks to human dignity and the costs and benefits of law enforcement activity. Second, because existing efforts to regulate the police operate without coordination, the multiple efforts to govern policing sometimes conflict and undermine rather than reinforce the policy goals of balancing the costs and benefits of law enforcement. Finally, various political institutions face structural limitations and incentives that may be incompatible with effective regulation of the police. Future efforts to improve law governing the police must address these substantial challenges.

Related Entries

- ▶ Civil Remedies
- ▶ Control of Police Misconduct
- ▶ Law of Police Interrogation
- ▶ Law of Police Searches
- ▶ Law of Police Seizures and the Exercise of Discretion
- ▶ Law of Police Use of Force
- ▶ Law of Undercover Policing
- ▶ History of Police Unions

Recommended Reading and References

Amsterdam AG (1974) Perspectives on the fourth amendment. Minnesota Law Rev 58:349
Armacost B (2004) Organizational culture and police misconduct. George Washington Law Rev 72:453
Avery M, Rudovsky D, Blum K (2012) Police misconduct: law and litigation. 3d ed
Bradley, CM (1993) The failure of the criminal procedure revolution
Harmon RA (2012) The problem of policing. Michigan Law Rev 110:761
Katz v United States 389 U.S. 367 (1967)
Mapp v Ohio 367 U.S. 643 (1961)
Miller ML, Wright RF (2005) Criminal procedures: cases, statutes, and executive materials. 2d ed
Miranda v Arizona 384 U.S. 436 (1966)
Monroe v Pape 365 U.S. 167 (1961)
Skogan WG, Frydl K (eds) (2003) National research council. Fairness and effectiveness in policing: the evidence, Washington, D.C
Stuntz WJ (2001) The pathological politics of criminal law. Michigan Law Rev 100:505
Walker S (2005) The new world of police accountability

Legal Frameworks for Third-Party Policing

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Synonyms

Plural Policing; Regulatory Crime Control; Third Party Policing

Overview

Public police are now one part of a network of law enforcement that includes private police and security, regulatory agencies, businesses, schools, and private individuals. Police have always formed partnerships to help them in responding to, and preventing crime, but increasingly these partnerships are moving beyond joint approaches to solving community problems. Third-party policing is an approach that rests on the use of legal levers available to non-offending third parties under regulatory and private law frameworks. There has been a blurring of these frameworks in recent times, so that many noncriminal levers are available for police and their partners to use for crime reduction purposes. The types of levers commonly used in third-party policing are discussed, along with the types of crime and disorder problems which they have been used to address. Challenges to the broader use of regulatory frameworks are overviewed, and future directions and especially the need for further research, are suggested.

Introduction

Third-party policing (TPP) occurs when police form crime control or prevention partnerships or networks with non-offending third parties (Mazerolle and Ransley 2005; Buerger and Mazerolle 1998). Police partner with a range of

state and non-state agencies, private organizations, and individuals to focus on crime reduction or prevention goals. Typical partners include housing agencies, property owners, rental agents, health and building inspectors, private businesses and professionals, parents, schools, and private security providers. Typical crime problems at which TPP has been directed include illicit drugs, alcohol-related violence and disorder, young offenders, and property offenses.

The distinctive feature of TPP, compared with other innovative and proactive policing strategies such as problem-oriented policing (POP), is its placement within a legal and regulatory framework. This framework enables police to use the authority and powers of their voluntary, co-opted, or coerced partners to help control crime problems. In particular, police gain access through their partners to a range of criminal and noncriminal legal mechanisms or levers. These levers include civil regulation and remedies, along with contractual and tortious rights, which can greatly extend the reach of police (Mazerolle and Ransley 2005, 2006). Unlike POP, TPP goes beyond merely "harnessing the crime control capacities of third parties" (Cherney 2008: 631) in identifying and developing responses to crime problems. It draws on developments in regulatory theory and practice that allow police to use new techniques, institutions, and mentalities of control. Police become part of the trend to regulatory justice (Crawford 2003, 2009) that can extend and improve upon traditional criminal justice responses. In its focus on problem places, people, and activities, TPP also brings together opportunity and place-based theories of crime and crime prevention with innovative policing strategies, and gives police a new role as regulators of crime (Eck and Eck 2012; Mazerolle and Ransley 2012).

One appeal of TPP for governments and law enforcement is that non-offending third parties assume, or are made to assume, some of the responsibility and costs of controlling and preventing crime. Especially in times of fiscal restraint this has economic advantages (Eck and Eck 2012), as well as giving police access to new levers and remedies, such as civil orders and injunctions, property closures, parental responsibility contracts, and asset forfeiture schemes. These levers can be directed at the underlying causes and supports of crime, and can have a preventive and intelligence-based focus rather than the purely reactive responses of most traditional policing practices. A second appeal of TPP is that by relying on noncriminal measures, some of the restrictions and protections of the criminal justice system such as high evidentiary standards and burdens of proof, can be avoided (Mazerolle and Ransley 2005; Crawford 2009).

The discussion below canvasses these issues, beginning with an analysis of the regulatory and legal context of TPP. It compares TPP with traditional approaches to crime control and prevention, and then discusses in detail the legal frameworks most used in TPP. The discussion moves on to some of the key issues and debates arising from the topic, including the potential impact of TPP on increased criminalization and net-widening, and for inequitable and discriminatory policing. The final comments address future directions for TPP and the need for more evidence-based research on what levers work best and when, and why this is so.

Fundamentals

Context: Regulatory Approaches to Criminal Justice

Third-party policing approaches are part of a broader shift in regulation and governance which has occurred in many societies over the past 40 years, and which has led to new responses to crime along with many other social and economic problems (Feeley and Simon 1992; Ericson and Haggerty 1997; Garland 2001; Ericson 2007). The new approaches to governance have involved a move away from state sovereignty and control to networks of power (Braithwaite 2000), a diffusion of responsibility (Garland 2001), and an expectation that non-state actors and individuals must contribute to responses and solutions. Regulatory theorists see this as a shift from state-centered command and control to new modes of pluralistic, networked, or nodal regulation (Burris et al. 2005).

Central to this shift has been the rise of risk as an organizing concept, so that the new forms of regulation rely on notions of risk assessment, identification, and analysis, rather than on general rules applied equally to all regulated individuals (Sparrow 2012). Feeley and Simon (1992) applied this concept to criminal justice, arguing that it has seen a shift from a focus on individual offenders, the assignment of blame and responsibility, and goals of treatment and rehabilitation. In their "new penology," the focus instead is on actuarial classifications of risk and dangerousness and reliance on selective surveillance and incapacitation to reduce crime opportunities (Willis and Mastrofski 2012). The shift from old to new penology is also a shift from seeing crime as deviance to crime as normalized, and from ideas of treatment and rehabilitation to the management of risk (Garland 2001).

At the same time, the development of the new regulatory state (Braithwaite 2000) has led to a "proliferation of new administrative agencies as well as an enormous expansion in private policing. Regulatory and private policing entities are part of a new division of policing labour with the public police" (Ericson 2007: 387). Regulatory styles have also shifted, from a focus on command and control and detailed prescriptions and inspectorate models, to new forms of responsive and smart regulation tailored to particular industries and contexts, and in which risk identification and management again plays a central role (Mazerolle and Ransley 2005).

As a result of these trends to risk, regulation, and pluralization, public police have now been joined by regulatory agencies with many police-like powers, and private policing organizations, in overlapping networks of security. Policing is now provided by "a growing plethora of governmental and non-governmental providers" (Stenning 2009: 22; Jones and Newburn 2006). Contemporary policing is marked by diversity, complexity, and a "messy reality" where rather than smart and responsive regulation playing a less coercive role than traditional law enforcement, tools of intervention have become increasingly interchangeable and overlapping (Crawford 2006: 469). In this environment the role of public police has changed, so that policing services are increasingly provided by networks of public, private, and welfare agencies, with public police as one node of the network (Ransley and Mazerolle 2009), albeit a coordinating or anchoring node (Ericson and Haggerty 1997; Crawford 2006).

In addition to these new regulatory approaches to criminal justice and policing, new theories have been developed about crime control and prevention. The rise of crime opportunity theory and its focus on places, patterns, routine activities, and rational choice has led to recognition that regulation and regulatory measures or instruments have a central role to play in criminal justice and crime control (Eck and Eck 2012; Ayling et al. 2008; Mazerolle and Ransley 2012). TPP provides an organizing framework for how this occurs, and highlights the role of police in developing and implementing new regulatory approaches to crime control and prevention.

As discussed earlier, TPP occurs when police persuade or coerce non-offending partners into assuming crime reduction or prevention responsibilities. As such, police form formal or informal partnerships directed at specific crime problems. The development of police partnerships is not new – as Smith and Alpert (2011) point out, Sir Robert Peel's eighteenth-century "new police" rested on a community partnership model. Contemporary versions of community policing also rely heavily on policing as a series of collaborative partnerships (Willis and Mastrofski 2011; Skogan 2011) focused on identifying and solving community problems. The "joint policing" model involves "collaborative, proactive, preventive actions to reduce or remove crime and to protect and secure spaces and places in lieu of traditional reactive models" (Smith and Alpert 2011: 136). Similarly, problem-oriented policing approaches often focus on police working with community members to identify problems and their solutions. What sets third-party policing apart from these other strategies is the way in which it involves police harnessing not just partners but their formal and informal legal powers over offenders or potential offenders. These partnerships occur within a context of changing legal frameworks.

Changing Legal Frameworks

The messy reality of policing now draws on a range of legal frameworks, in addition to traditional criminal justice models. The major distinction between these frameworks has been in their goals and targets – traditionally criminal law has focused on detecting and prosecuting those who commit morally wrong offenses, while regulatory and private law measures have focused on governing legal business and private activities (Mazerolle and Ransley 2012), mainly using negotiation, inspection, and administrative and civil sanctions, as shown in Table 1. As an organizing and analytical mechanism, the different categories of law are described by reference to their goals, attributes, targets, methods, outcomes, actors, and styles (see Mazerolle and Ransley 2005: 67–69; Cheh 1998).

In the context described above, where trends in governance, risk, and pluralization have broken down traditional categories, there has been a blurring of legal frameworks. As shown in Table 2, criminal law now draws on regulatory and civil law mechanisms, and vice versa. Mazerolle and Ransley (2005: 67) refer to this as a convergence of legal frameworks. In this environment, criminal law makes use of civil processes and remedies, while in both regulatory and private law serious misbehaviors are criminalized. The major implication of this convergence in legal frameworks has been to facilitate the use in criminal law enforcement of a large range of sanctions and processes outside the traditional criminal justice system, such as civil remedies and administrative sanctions. The principal facilitator of this convergence has been the concept of risk. Proactive policing strategies have focused on risky places (i.e., hotspots of crime) and people (i.e., repeat offenders, particular groups), while regulators have adopted self-regulation approaches based on risk assessment (Sparrow 2012). The main effect of this convergence can be seen in Table 2 in that there has been a blurring of targets, methods, outcomes, actors, and styles across the different categories of law, in contrast to the relatively clear-cut divisions shown in Table 1.

The rise of TPP is a reflection of this convergence, in that it enables police to draw on a much wider variety of legal levers than was previously available to them. The next section discusses some of those levers.

Legal Levers for Third-Party Policing

Despite this convergence of legal frameworks, it is important to understand the source of law that underpins each legal lever used in TPP, because this source affects the nature, extent, and limitations of the lever. Table 3 summarizes the levers commonly used in TPP and their main features. For each type of lever, there is a description of the source of authority (whether legislation, regulation, contract, or tort), the extent to which the lever applies (i.e., generally or targeted), and the types of legal outcomes that can arise. The final column indicates the range of non-offending third parties who are utilized by each lever to achieve crime control or reduction benefits, through the co-option of their legal authority.

Table 3 is not a comprehensive list of legal levers available, but it does illustrate the range and breadth of measures, and of potential third parties, that can be used in TPP. Mazerolle and Ransley (2005) give comprehensive examples of the ways in which each of these levers has been used across different jurisdictions, in the two broad areas of controlling and prevent drug problems, and other forms of crime. For drug problems, laws and regulations focused on premises (e.g., crack houses, methamphetamine laboratories, derelict buildings), and accompanying nuisance abatement civil suits, have been used in many places in the United States and Australia. These strategies involve police partnering with city and state inspectors and sometimes neighbors, to require property owners to become more responsible for controlling activities on their premises that lead to drug problems. A range of civil sanctions can be used (fines, injunctions, rectification orders, loss of license or permit, forfeiture) to persuade or coerce these third parties to assume crime control responsibilities. This not only shares responsibility but shifts some of the costs associated with crime reduction to third parties. The use of civil levers removes the need

Legal Frameworks for Third-Party Policing, Table 1 Traditional categories of law

Focus	Criminal	Regulatory	Private
Goal	Detection, prosecution, punishment, rehabilitation of offenders	Orderly conduct of economically desirable activities	Dispute resolution in private financial and family activities
Activities	Morally repugnant offenses	Business activities	Commercial and domestic interactions
Targets	Individual offenders	Businesses	Private individuals and groups in dispute
Methods	Investigation, arrest, criminal trial	Conciliation, negotiation, self-regulation, inspection, limited prosecution	Private court action to enforce rights under contracts and tort
Outcomes	Fines, incarceration	Penalties, rectification orders, license revocation	Damages, injunctions, specific performance
Actors	Police, prosecutors, courts, correctional staff	Regulatory agencies, local governments, industry associations	Individuals in private relationships, civil courts
Style	Guilt and punishment for individual offenses	Creation of business obligations, consequences enforced by sanctions	Creation of private obligations, consequences enforced by sanctions

Source: based on Mazerolle and Ransley (2005, 68)

Legal Frameworks for Third-Party Policing, Table 2 Converging categories of law

Focus	Criminal	Regulatory	Private
Goal	Identification and prevention of potential crime risks, detection and prosecution of offenders	Identification and prevention of potential regulatory risks	Prevention and resolution of private disputes
Activities	Morally repugnant offenses, antisocial behavior	Business activities	Commercial and domestic interactions
Targets	Groups and places with high risk of crime, offenders, nuisances	Businesses and industries at risk of noncompliance	Individuals and groups at risk of or in dispute
Methods	Investigation, arrest, trial, surveillance, statistics, profiling, incapacitation, responsibilization	Codes of practice, reporting, statistics, audit, enforcement pyramids, responsive regulation, criminalization	Private court action to enforce contract and tort rights, statutory remedies, criminalization
Outcomes	Fines, incarceration, forfeiture, injunctions, preventive detention, behavior contracts	Penalties, rectification orders, license revocation, fines, incarceration, damages, injunctions	Damages, injunctions, specific performance, fines, incarceration
Actors	Police, prosecutors, courts, correctional staff, local governments, health and housing agencies, community groups, forensic specialists	Regulatory agencies, local governments, industry associations, consumer groups, international regulators	Individuals in private relationships, government and community agencies, police, prosecutors, courts, tribunals, welfare agencies
Style	Guilt and punishment, consequences enforced by sanctions, therapeutic, restorative	Guilt and punishment, consequences enforced by sanctions	Guilt and punishment, consequences enforced by sanctions, therapeutic

Source: based on Mazerolle and Ransley (2005, 68)

for police to gather evidence to a criminal standard of proof, to prove individual responsibility for breaches, and often also involves a reversal of the burden of proof, so that property owners must show they were not aware of criminal activities to avoid responsibility. Other drug problem-related forms of TPP include monitoring and reporting schemes, such as when doctors, pharmacists

Legal Frameworks for Third-Party Policing, Table 3 Legal frameworks for third-party policing

Extent of application	Legal outcomes	Types of TPP levers and interventions	Third parties targeted by the intervention
Statutes			
General or a specified population, e.g., liquor retailers, parents, gangs	Criminal or civil action leading to criminal or civil penalties, or administrative measures	*Orders to control behavior*, e.g., antisocial behavior orders; truancy and gang orders, child welfare and domestic violence orders, mental health and vagrancy laws	Parents, schools, non-offending gang members, institutions and shelters, housing authorities
		Movement and association limits, e.g., curfews; traffic, move-on, and crowd control powers; probation and community corrections conditions limiting criminal contacts	Parents, local councils, probations/corrections staff
		Conduct licensing, e.g., alcohol, firearms and prostitution licensing, pawn/second-hand shops and dealers	Retailers, service providers
		Formalized surveillance, e.g., offender notification, probation and community corrections reporting conditions	Probations/corrections staff
		Property controls, e.g., drug house and rave site limits	Property owners, rental agents local councils
		Mandatory reporting, e.g., methadone prescribing, cash transactions, chemical sales, child and spousal abuse	Doctors, pharmacists, health funds, banks, retailers, schools
		Civil forfeiture, e.g., assets gained through crime, "hoon" cars	Banks, vehicle licensers
Regulation/subordinate legislation			
General, within a specified area, e.g., local council or housing authority area	Criminal or civil action leading to criminal or civil penalties, refusal of consent, eviction, rectification orders, property forfeiture or confiscation	*Orders under regulatory codes*, e.g., building, fire, health, safety, noise, animals, liquor licensing, environmental, public housing, parking, venue by-laws and codes requiring closure, rectification, removal of hazards, or restrictions on use	Property and business owners, local councils, housing authorities, regulatory agencies
		Product and service standards, e.g., requiring vehicle immobilizers	Manufacturers and service providers, standards associations
		Controlled zones, e.g., begging, busking, drug and alcohol free areas, limits on street prostitution	Local councils, retailers and business owners, prostitutes
Contract			
Specific – parties to a contract	Civil action for specific performance, damages or injunction, non-renewal of contract, eviction, loss of bond	*Enforcement of conditions*, e.g., property use and maintenance in private housing and commercial leases; crime reduction measures in service provision contracts, e.g., lighting and security	Property and business owners and associations, housing authorities

(*continued*)

Legal Frameworks for Third-Party Policing, Table 3 (continued)

Extent of application	Legal outcomes	Types of TPP levers and interventions	Third parties targeted by the intervention
		standards in commercial car parks	
		Incentives, e.g., insurance bonuses and rebates for crime prevention measures	Landlords, insurers
Tort			
Specific – duty of care owed	Civil action for damages or injunction	*Actions for nuisance, trespass, or negligence*, e.g., against noise, physical disorder, pets, physical access, breach of duty of care, misfeasance	Landlords, local councils, housing authorities, liquor retailers, licensed venues

or chemical manufacturers, wholesalers and retailers are required to record and report transactions involving drug precursors. Such schemes co-opt these third parties into systems of surveillance and sources of intelligence for proactive policing.

For other nondrug crimes, the most widespread use of TPP has been in schemes designed to reduce or prevent antisocial behavior and disorder. The most comprehensive of these schemes is the antisocial behavior agenda introduced in Britain from 1998 onward, which featured a range of civil orders and contracts imposed to control offending and pre-offending activities. Crawford (2009: 817) identifies 18 new tools used in this scheme, including civil orders (e.g., antisocial behavior, drug intervention, parenting, individual support, child curfew, dispersal, drink banning orders) and contracts (e.g., acceptable behavior, parenting, tenancy contracts). All of the measures are civil, involving a mix of regulatory and contractual techniques, but breach of most leads to a criminal sanction. The scheme has been much criticized, and while the new government elected in 2010 announced its intention of withdrawing the system, its most recent proposals suggest that many of the new tools will be rebranded and retained (see The Independent, 23/5/2012). While the British antisocial behavior scheme is comprehensive, many of its individual components are seen in other jurisdictions. In particular, measures directed at parental responsibility for juveniles, such as truancy and curfew orders, are common in Australia and some parts of the United States (see Mazerolle and Ransley 2005). Most jurisdictions have anti-vagrancy and begging regulations, and several Australian states have introduced civil measures directed at alcohol-related violence (see Mazerolle et al. 2012). These types of levers induce third parties, whether parents, schools, club-owners, or city administrators, to accept responsibility for reducing crime and disorder using civil or private law measures available to them.

As discussed above, increasingly, this type of approach is coupled with crime opportunity approaches that seek to identify and reduce facilitating environments for crime. As Eck and Eck (2012: 308) note, "rather than viewing crime as simply a matter between offenders and police, a place focus requires consideration of the morality of crime facilitation by third parties." They suggest that such approaches can not only reduce crime, but also reduce the economic demands on police and policing, by sharing responsibility and costs. However, the extension of responsibility in this way, and the increased use of TPP and regulatory strategies, is not without problems and controversies, and the next section examines some of these.

Key Issues and Controversies

A threshold problem for TPP approaches is that, typically, police agencies are different to regulators and other third parties. Police do not view

themselves as regulators, have different systems of training and organization, and a different culture. Sparrow (2012: 347) refers to this as the "divide" between police and regulators and attributes it to police unfamiliarity with the role of regulations, the distinctive police culture and domain, and the special risks they face. These differences can impede police from recognizing opportunities for TPP, and identifying regulators and legal levers that can be used to respond to particular crime problems. However, Sparrow (2012) also sees similarities between the shift in regulatory approach to risk-based strategies and the rise of POP and other innovative policing strategies which are similarly based on risk. He argues that POP has become single-dimensional, focused almost entirely on place-based interventions, and that increased use of a toolbox of regulatory strategies can expand the reach of innovative policing. But Sparrow (2012: 354) concedes a significant barrier to this occurring – how can police and regulators agree on who does what to deal with particular problems? Tilley (2012) goes further to ask who should pay for what and who should bear the costs of crime prevention efforts? This is particularly important when crime and its prevention is not the core business or concern of most third parties identified in the discussion above.

Tilley (2012) and Eck and Eck (2012) identify other potential problems with regulatory approaches to crime control and prevention. Spreading responsibility to non-offending third parties can create costs for the blameless, as well as those who facilitate crime, for example, when all bar owners are required to upgrade security in response to violence that occurs only at a few sites. Some strategies can be seen as too interventionist, such as the requirement for bars to use plastic glasses or serve low-alcohol drinks (Mazerolle et al. 2012). Such measures can add to the cost of doing business and favor those traders who cut corners rather than those doing the right thing.

Mazerolle and Ransley (2005) grouped the disadvantages of TPP as unintended side effects: the disproportionate allocation of policing and regulatory resources creating either over- or under-policing; the displacement of crime problems; the intensification of crime and disorder in already disadvantaged areas; the co-option of regulatory resources and agendas away from their core concerns, such as public health and safety; and the dilution of criminal law protections and restraints. Additionally, there is a danger of regulatory creep that extends the acceptable limits of government intervention in the lives of citizens and businesses. Crawford (2009: 818–819), discussing the British antisocial behavior agenda, notes similar concerns including: the use of civil measures to evade criminal justice process; the introduction of new forms of hybrid liability that potentially lead to increased criminalization and net-widening; the reliance on subjective perceptions of risk in place of objective assessments of past conduct; the privileging of public anxieties, fears, and concerns as triggers for formal action (as in dispersal orders); the trends to preemption and individualized rather than generally applied controls; and the substitution or supplementation of judicial decision making by police and regulatory discretion.

Many of these concerns and issues remain unexamined in any systematic way, with the possible exception of the British antisocial behavior system. How TPP affects the communities in which it is practiced, whether it does so equitably and with accountability are empirical questions that remain largely unanswered. Also insufficiently examined is the effectiveness of TPP – does it work, and if so, when and in what forms? Mazerolle and Ransley (2005) conducted an extensive review of the evaluation literature, identifying 80 studies of TPP strategies. They found that business owners are the third parties most often targeted to share crime control or reduction responsibility, in dealing with problem bars, property crime in unsecured car parks, drunks and disorderly behavior in public places, and street prostitution. Other third parties included parents, schools, liquor licensing authorities, car manufacturers, local councils and public housing authorities. Overall, the use of these third parties and their legal levers was found to be an effective tactic for crime control.

Future Directions/Conclusion

The use of TPP is part of a shift to regulatory justice that positions police at the center of crime control and prevention networks. Most TPP currently occurs in an ad hoc and variable way, apart from the British antisocial behavior agenda. In times of financial constraint, TPP will become increasingly attractive to governments wanting to share costs with business and individuals, and with police agencies wanting to draw on the resources and expertise of other regulatory bodies.

While there is some evidence that TPP is effective (see Mazerolle and Ransley 2005; Eck and Eck 2012), there is a clear need for more research that encompasses at least the following:

- The full range of legal levers for TPP that already exist and the contexts in which they are available for use in TPP strategies
- The effectiveness and limits of various levers in various situations – what works, when, and why
- The full costs of financial burdens shifted to others through TPP, and the impact on their private or regulatory functions and concerns that results
- The extent to which TPP is used differentially in different communities – are disadvantaged neighborhoods over-targeted or neglected?
- The extent to which TPP is used differentially against different social and demographic groups – to their advantage or disadvantage
- The extent to which TPP has resulted in expanded criminalization, leading to new offenses and criminalizing conduct previously seen as disorder or nuisance
- The extent to which TPP has resulted in net-widening, particularly by criminalizing noncompliance with regulatory and civil sanctions
- The extent to which TPP has diluted criminal justice processes, by criminalizing those against whom noncriminal justice processes have been used
- The impact of TPP on regulators and the extent to which their agenda has become co-opted by crime reduction concerns

There seems little doubt that the trend to regulatory justice, and the accompanying rise of TPP strategies, is occurring. The challenge for police is to manage this trend in a thoughtful and useful way. The challenge for researchers is to study the features, utility, and costs of the trend and to suggest ways of better harnessing its advantages while minimizing the potential costs and disadvantages.

Related Entries

- ▶ Cost-Benefit Analysis
- ▶ Civil Remedies
- ▶ Pulling Levers Policing
- ▶ Third Party Policing and School Truancy
- ▶ Third-Party Policing

Recommended Reading and References

Ayling J, Grabosky P, Shearing C (2008) Lengthening the arm of the law: enhancing police resources in the twenty-first century. Cambridge University Press, New York

Braithwaite J (2000) The new regulatory state and the transformation of criminology. Brit J Criminol 40(2):228–238

Buerger M, Mazerolle L (1998) Third party policing: a theoretical analysis of an emerging trend. Justice Quart 15(2):301–308

Burris S, Drahos P, Shearing C (2005) Nodal governance. Aus J Legal Philos 30:30–58

Cheh M (1998) Civil remedies to control crime: legal issues and constitutional challenges. In: Mazerolle L, Roehl J (eds) Civil remedies and crime prevention. Crime Prevention Studies, Monsey, New York: Criminal Justice Press, Vol 9, pp 45–66

Cherney A (2008) Harnessing the crime control capacity of third parties. Policing: Inter J Police Strat Manage 31(4):631–647

Crawford A (2003) Contractual governance of deviant behaviour. J Law Soc 30:479–905

Crawford A (2006) Networked governance and the post-regulatory state? Theoretical Criminol 10:449479

Crawford A (2009) Governing through anti-social behaviour: regulatory challenges to criminal justice. Brit J Criminol 49:810–831

Eck J, Eck E (2012) Crime, place and pollution: expanding crime reduction options through a regulatory approach. Criminol Public Policy 11(2):281–316

Ericson RV (2007) Rules in policing. Theoretical Criminol 11(3):367–401

Ericson RV, Haggerty KD (1997) Policing in the risk society. Toronto University of Toronto Press, Toronto
Feeley M, Simon J (1992) The new penology: notes on the emerging strategy of corrections and its implications. Criminology 30(4):449–470
Garland D (2001) The culture of control: crime and social order in contemporary society. Oxford University Press, Oxford
Jones T, Newburn T (2006) Plural policing: a comparative perspective. Routledge, London/New York
Mazerolle L, Ransley J (2012) Crime, place and pollution: expanding crime reduction options through a regulatory approach. Criminol Public Policy 11(2):335–344
Mazerolle L, Ransley J (2005) Third party policing. Cambridge University Press, New York
Mazerolle L, Ransley J (2006) The case for third party policing. In: Weisburd D, Braga A (eds) Police innovation: contrasting perspectives. Cambridge University Press, New York, pp 191–206
Mazerolle L, White G, Ransley J, Ferguson P (2012) Violence in and around entertainment districts: a longitudinal analysis of the impact of late-night lockout legislation. Law Policy 34(1):55–79
Ransley J, Mazerolle L (2009) Policing in an era of uncertainty. Police Practice Res: Inter J 10(4):365–381
Skogan W (2011) Community-based partnerships and crime prevention. Criminol Public Policy 10(4):987–990
Smith HP, Alpert GP (2011) Joint policing: third parties and the use of force. Police Practice Res 12(2):136–147
Sparrow M (2012) Joining the regulatory field. Criminol Public Policy 11(2):345–359
Stenning P (2009) Governance and accountability in a plural policing environment – the story so far. Policing 3(1):22–33
The Independent (23rd May 2012) 'Crimbos' replace Asbos – but will they rush children into custody? Accessed at http://www.independent.co.uk/news/uk/crime/crimbos-replace-asbos–but-will-they-rush-children-into-custody-7778907.html
Tilley N (2012) Crime reduction: responsibility, regulation and research. Criminol Public Policy 11(2):361–378
Willis JJ, Mastrofski SD (2011) Innovations in policing: meanings, structures and processes. Annual Rev Law Soc 7:309–334
Willis JJ, Mastrofski SD (2012) Compstat and the new penology: a paradigm shift in policing? Brit J Criminol 52(1):73–92

Legal Interventions

► Lawful Killings

Legal Rules, Forensic Science and Wrongful Convictions

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Synonyms

Junk science; Miscarriages of justice

Overview

Law and science have long had a strained relationship although their tendency to "clash" may have been exaggerated over the years. The source of their disharmony has most often been seen as the result of the two domains having both dissimilar methods and goals. Regardless of the extent to which this is true, there remain apposite and acute concerns regarding the status of science utilized by the law, in particular forensic science and its interplay with criminal law. Without delving into the philosophy of science or law, or the psychology of the courtroom, it is considered here whether legal rules have, and can, prevent flawed scientific evidence from entering the courtroom by empowering judges to rule questioned scientific evidence inadmissible. It concludes that where evidential hurdles for forensic science exist, decisions to permit forensic science into evidence may still appear arbitrary, as well as inconsistent between and within jurisdictions. In addition, such hurdles may come too late in the criminal process to prevent all injustices. Current attempts to regulate forensic science are welcome but do not yet go far enough to ensure that wrongful convictions will not continue to occur, with forensic science and scientists playing a significant role in these miscarriages of justice and judges unable to execute their gatekeeper role effectively and consistently.

Fundamentals

The prefix "forensic" simply means the use of science in legal fora: applying science to answer

a legal question. Efforts have been made to circumscribe the field of "forensic science," with the UK's (now defunct) Forensic Science Service stating that the task of forensic science is "to serve the interests of justice by providing scientifically based evidence relating to criminal activity," and the definition given in the US Congress Forensic Science and Standards Bill of 2012 3(a): "'forensic science' means the basic and applied scientific research applicable to the collection, evaluation and analysis of physical evidence, including digital evidence, for use in investigations and legal proceedings, including all tests, methods, measurements and procedures."

Most often, forensic science is a subdiscipline of a larger scientific body, such as pathology, toxicology, archaeology, or genetics. There are also a variety of "experts" who may be called upon to testify on matters in issue at trial (e.g., forged documents, firearms), each being a "forensic specialist" for the purposes of a criminal trial. There is potentially no limit to the scope of physical evidence (or "trace" evidence) that can be utilized, from the smallest fragment of glass, the most obscured fingerprint, or the tiniest swab of human tissue to the entire scene of a major disaster or the realms of cyberspace. There are, therefore, potentially no limits on the number of disciplines that may be utilized in a forensic investigation. Herein lies one of the pivotal difficulties with forensic science: the multiplicity of techniques, technologies, and disciplines, which can sit under the "forensic science" umbrella, risks over-inclusion. It is this over-inclusion that lies at the crux of some of the frustrations with forensic science. While some forensic technologies are born of rigorous scientific testing and experimentation (the oft-used example being DNA profiling), many others have no, or a minimal, scientific basis or grounding in experimentation and testing.

This variety of disciplines and techniques and their great variances in reliability and validity create an issue for users of forensic science: how to discern between those reliable and valid techniques that can assist, and those that may be insufficiently reliable and valid, and can mislead. So, while on first blush it would appear contradictory to discuss forensic science and judicial oversight alongside wrongful convictions, this question occupies the minds of legal professionals, researchers, practitioners, and forensic experts alike: how can courts ensure that valid and reliable scientific evidence, and *only* valid and reliable scientific evidence, is adduced during trials, thereby using forensic science to *prevent* wrongful convictions?

Ruling potentially unreliable or invalid forensic evidence inadmissible at trial, while clearly having an impact on that specific trial, may also have important wider ramifications. If a particular expert, expertise, or evidence type is regularly deemed inadmissible, then police or legal professionals will lose confidence in them and stakeholders may insist upon greater controls or regulation. It may be that, as we have seen in the USA, Canada, and the UK in recent years, political demands are made for changes to the forensic science community. Public confidence in the operation of the criminal justice system is an essential prerequisite of any legitimate legal system, and if forensic science brings that system into disrepute or diminishes public confidence, then the forensic science community should not be surprised if their reputation en masse is tarnished and stricter regulation is insisted upon.

Key Issues/Controversies

The forensic scientist (or rough equivalent) has been popularly portrayed in both factual and fictional media as a heroic figure in the fight against crime. In the twenty-first century, that portrayal has had to become more nuanced as forensic science has been pinpointed as playing a role in causing wrongful convictions while failing to prevent others. Forensic scientists have been accused of inter alia: negligence, corruption, and perhaps most critically, of not being "scientists" at all.

The growing international "innocence movement" has paradoxically utilized modern forensic techniques and technologies to free innocent prisoners, simultaneously demonstrating the flaws of many forensic techniques that were used to convict those prisoners and the failure

of the courts to prevent misrepresented or misinterpreted forensic evidence from being relied upon at trial. Yet wrongful convictions most often result not from a single error but a composite of failures that can include, but are clearly not limited to, the gathering, interpretation, and communication of forensic evidence. It is most often human fallibility that lies at the heart of wrongful convictions. Forensic science can then overcome the failings of many other, unreliable, and often highly questionable evidence types, regularly relied upon at court. For this reason, forensic science cannot fairly be portrayed as the cause of wrongful convictions, as it plays probably a more significant role in prevention and cure; these three roles are considered, before turning to the place of forensic science in the courtroom.

During police investigations, the gathering of scientific evidence cannot prove any one theory of events, or conclusively prove anyone guilty of a criminal offense in isolation of other evidence, but it can be incredibly valuable in explaining events and implicating individuals involved in criminality. Most often, its value can lie in supporting, or refuting, a version of events provided by those deemed to be involved (or by the police, prosecution, or defense). Indeed, forensic science is now considered integral to many criminal investigations, particularly serious offenses, but also "volume" (mostly property) crimes. Forensic science as neutral, objective, evidence is perhaps of most value at the outset of police investigations, where erroneous judgements or false assumptions can send investigators down a blind alley. A piece of scientific evidence gained early in an investigation can ensure that the wrong suspects do not continue to be the center of investigators attentions, thus preventing a wrongful conviction.

Some traditional police "practices," hopefully now becoming obsolete, have not always leant themselves to ensuring that only the guilty are ever convicted. Many suspects in the past have been "persuaded" to confess, and not only the guilty succumbed to such pressure. Informants were also heavily relied upon, and written police statements were not always entirely accurate. However, police practices were not always to blame. Police relied – and still do to a greater extent – on witnesses. These may be eyewitnesses, which are considered highly valuable in securing a conviction. However, as psychologists have demonstrated for many years, people can be highly unreliable at the same time as highly persuasive, especially when they truly believe themselves to be telling the truth. There is a wealth of research on how poor human memory is, how bad we are at identifying people (particularly people we don't know or who are different from us ethnically or in terms of age), how easily we can be persuaded of something or change our recollections to match them with expectations, etc. In short, relying on humans to assist in the detection and prosecution of offenses can be highly problematic, even when those humans are not deliberately lying.

In light of such unreliability, scientific evidence would seem to avoid these "human" problems. There is no need to rely on a person testifying that they saw the defendant at the scene of the crime, if we also have their fingerprints found at the scene. There have been numerous cases where eyewitnesses – victims even – have identified with 100 % certainty their attacker, and yet later DNA evidence has proven that they are mistaken. It would seem far safer to rely upon a DNA match of a rapist than the testimony of the victim (certainly if they don't know their attacker before the crime). Furthermore, the popular (and populist) perception of an almost continuous increase in crime, coupled with a perceived inability on the part of the police to detect criminals or convict them, raises the hope that scientists will be able to tip the justice scales back in favor of the police and prosecution. The growth in forensic science is then based upon the assumption of science as capable of being a neutral, objective, "arbiter of truth" (Dreyfuss and Nelkin 1992: 339). However, uncritical faith can be misplaced, and as scientists themselves warn, "the general public often has an unrealistic expectation of what forensic science can achieve" (Ross 1998: 41).

Yet, forensic science has come to the aid of many wrongfully convicted, most clearly in DNA exonerations, of which there have been over 300

in the USA alone since 1989, with undoubtedly many more to come. The discovery and proliferation of DNA profiling has had a dramatic impact because it has come to be trusted as almost indisputable evidence. The strength of DNA evidence has meant many convictions have been overturned that would have been impossible to overturn otherwise. In some of these cases, DNA has subsequently been used to locate the real perpetrators, sometimes many years after the crime. In just one example, Sean Hodgson spent 27 years in an English prison for a murder that he had confessed to but had not committed. Blood type matching had been used at trial to support Hodgson's confession, but after DNA testing of the evidence 27 years later, it was proven that he was not the killer and freed. There have now been numerous cases around the world where innocent people have called for evidence to be tested or retested in their cases, in the hope that DNA will finally see justice in their case.

It is not hard when reading of famous miscarriages of justice to find instances of flawed scientific evidence being used to convict the innocent, from terrorist bombers found to have nitroglycerine on their hands, which it later transpired could have been a number of harmless chemicals from many household items, to mothers convicted of killing their babies when they had died of unknown, but entirely natural causes. Such cases exemplify the risks of relying upon techniques or "theories" that are erroneous. While experts in these cases were often castigated after the conviction is overturned, many had continued working and testifying before their mistakes were brought to light. The experts were also singled out as isolated "mavericks" in many instances, providing a scapegoat for the wider scientific community. Many other cases however, have relied upon valid scientific principles, but the expert has provided misleading testimony, often overstating the probative value of their evidence or its reliability.

The Innocence Project in New York has of February 2013 exonerated over 302 people wrongly convicted using DNA testing. In 50 % of those cases, the DNA testing has identified the true perpetrator. An early analysis of the first 86 of those exonerations found that faulty forensic evidence had played a role in two-thirds of the convictions. Latest analysis demonstrates that unvalidated or improper forensic science played a role in approximately 50 % of wrongful convictions later overturned (Innocence Project 2009). In such cases, if available evidence had been subjected to DNA testing, then the suspect would have been excluded and most often, another suspect indicated.

The US National Registry of Exoneration, launched in May 2012 by the University of Michigan Law School and the Center for Wrongful Convictions at Northwestern University, is an online database containing a list of exonerations in the United States since 1989. The registry lists more than 1066 wrongfully convicted individuals and is growing. In an analysis of 873 of these cases, 24 % featured false or misleading forensic evidence (Gross and Shaffer 2012). These figures are slightly lower than found by Neufeld and Garrett (2009) in their analysis of 137 trial transcripts of convictions later overturned by DNA. They found experts in 60 % of the cases to have given invalid testimony that overstated the evidence, was unscientific, or contrary to empirical data. They gave instances of erroneous or unsupported testimony about the accuracy and results of forensic techniques including hair comparison, bite-mark comparison, serology, fingerprint comparison, and even DNA testing.

While the work of a forensic expert can take place in any number of environments, particularly when examining crime scenes, for instance, the laboratory is most often the typical workplace of a forensic scientist. However, for forensic evidence to be of utility, it must be able to make the transition from crime scene, via the laboratory, to the courtroom, where it is ultimately used. While much forensic testing will not produce any positive results, or may simply be retained as "intelligence" for possible future use, if test results are not able to be admitted at court as relevant evidence, then the resources used to obtain that evidence will have been wasted. This transition to admissible evidence at trial is then essential if forensic evidence is to be able to play a role in criminal justice.

Experts have been permitted to give evidence in courts for centuries, and their word and expertise have been rarely questioned. Medical men of the middle ages, for example, were often called upon to testify as to their opinion on questions such as cause of death or the sanity of the defendant. Fingerprint experts have, for the last century, been testifying that the prints found at the scene of a crime, for example, "matched" the defendant to the exclusion of all others. However, it has been the massive expansion in forensic science in the last couple of decades, and the increasing incidence of DNA exonerations, that has led to the current paradox being brought into sharp relief. While it has compelling value in preventing and overturning wrongful convictions, forensic science can still also lie at the heart of flawed investigations and trials. In fact, forensic science is introduced to reduce uncertainty and bring objectivity to legal disputes, yet it is increasingly under fire for obfuscation, the introduction of partiality and partisanship, and creating new sites of dispute, that is, for *increasing* uncertainty rather than alleviating it.

One of the perennial predicaments is that while a technique may have a valid scientific basis and prove reliable in its application, how can it be ascertained that it was correctly applied in this case? What are the error rates associated with the technique that may mean that the testing could be wrong in this particular instance? Furthermore, are there any pertinent factors that could jeopardize the reliability or validity (or both) of the testing in the particular instance? For example, the operator (scientist) is incompetent or unqualified, the technique is novel and untested, contamination has occurred, the provenance of the exhibits or results cannot be attested to, and the results have been misinterpreted. As one can quickly see, the use of forensic science can be a complex and complicating factor in any legal dispute.

As the omnipotent umpire, the judge has the task of ensuring the legality and fairness of a trial, and for as long as experts have been allowed to give evidence, there have been rules regarding the expert's remit and the special allowances afforded them. In light of the powerful influence of science at trial, efforts have been made to bolster the role of the judge in ensuring that science is only used at trial when relevant and reliable and is represented impartially and accurately for the assistance of the fact finders. This has led to the common representation of judges as "gatekeepers," guarding the doors of the courts to ensure that invalid or unreliable science cannot enter. This could be argued to be the most obvious way to keep "junk" or bad science from admission at trial, but there are complicating factors. These are not limited to the fact that judges themselves are fallible, not always as impartial as one might hope, and rarely have a scientific grounding upon which to rely when ruling. The ability of judges to interpret and apply "correctly" (assuming there is a "correct" decision) complex exclusionary rules is further complicated by the difficulty of the task itself and the clarity, or otherwise, of the rules.

In a survey of 400 judges on their understanding and acceptance of their role as "gatekeeper," Gatowski et al. (2001: 443) found that 91 % believed the role was appropriate. Those doubting believed that judges had insufficient scientific training, making the role "'difficult, untenable, or inappropriate'" (Gatowski et al. 2001: 444). Indeed, the researchers found judges equally divided on whether their education adequately prepared them to deal with scientific evidence, many stating that the extent to which judges could properly apply criteria to judge scientific evidence was "questionable at best" (Gatowski et al. 2001: 451–452). The authors concluded that the lack of scientific literacy among trial judiciary, and the increasingly complex nature of the science coming before courts, demonstrates a need for more science-based judicial education (Gatowski et al. 2001: 455). While a laudable aim, the exclusionary rules themselves have been widely criticized (there is a substantial literature but, e.g., see Edmond (2000); Risinger (2000–2001); Danaher (2011)). These differ between jurisdictions with the USA, Canada, Australia, and the English courts all making attempts to improve the exclusionary rules applying to expert evidence, some meeting with more success than others. Some of the important cases are discussed below.

International Perspectives

The USA, perhaps unduly, has earned a reputation as both a highly litigious nation and one that has most utilized "junk" science to ensure a favorable legal outcome for clients, in particular in multimillion dollar "toxic tort" civil cases. Indeed, in the decades leading up to one particular toxic tort case, that of *Daubert v Merrell Dow Pharmaceuticals* 509 U.S. 579 (1993), there was a great deal of controversy over the perceived "flood of 'junk' science that, according to some popular critics, threatened to inundate the courts" (Beecher-Monas 1998: 58). The so-called *Daubert* case was the progenitor of two further cases which have come to be known as the "*Daubert* trilogy" (the other two being *General Electric Co. v Joiner, 522 U.S. 136, 118 S Ct. 512 (1997)* and *Kumho Tire Co. Lts v Carmichael, 119 S Ct. 1167 (1999)*). Prior to these, the standard for evaluating expert testimony was the "Frye" standard, from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). At the core of Frye was the contention that judges should refer to scientists, admitting evidence when the method utilized was "sufficiently established to have gained general acceptance in the particular field in which it belongs"(1014). This came to be known as the "general acceptance" rule and was reinforced by the Federal Rules of Evidence adopted in 1976, of which Rule 702 stated that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Many states continued to utilize the Frye standard, but the "general acceptance" rule gave rise to problems and two primary concerns: (1) it required the establishment of an "orthodoxy," but such an orthodoxy may be indulgent, in that it is based upon a body of work that has no scientific validity or has any checks or objective standards, and (2) waiting for "general acceptance" may stifle innovation or deprive courts of novel techniques or scientific breakthroughs. "Acceptance" within the scientific community can be misleading, in that some methods or theories are "accepted" almost by faith, and are not proven flawed for many years, perhaps refuted by people on the periphery who lack "acceptance" by the wider scientific community. The Frye standard and Federal Rules were then proving inadequate. A more stringent standard was therefore outlined in *Daubert*, where general acceptance was just one of five criteria by which to "test" scientific evidence:

1. Whether the theory or technique in question can be (and has been) tested
2. Whether it has been subjected to peer review and publication
3. Its known or potential error rate
4. The existence and maintenance of standards controlling its operation
5. Whether it has attracted widespread acceptance within a relevant scientific community

Most states have adopted the *Daubert* standard, some still work with the *Frye* test, and a few have their own tests they adopt on a case-by-case basis. *Daubert* explicitly placed judges in the role of gatekeeper who must evaluate the scientific validity and reliability of scientific evidence. It also switched the focus from whether there was a scientific consensus upon which to base the evidence given, to whether the techniques and methodology used were valid. The *Kumho Tire* case clarified that the *Daubert* analysis applies to scientific, technical, and otherwise specialized knowledge, and not exclusively to scientific evidence (so applying to engineers, etc.) (at 1175). *Kumho* also strengthened trial judge's discretion in noting that the judge had "considerable leeway" and "broad latitude" in flexibly applying the criteria set out in *Daubert* (at 1176).

Daubert has provided a useful checklist but is by no means uncontroversial. In his judgement in *General Electric Co. v Joiner*, 522 U.S. 136 (1997), Justice Stephen Breyer alluded to the difficulties that judges faced: "scientific evidence often requires judges to make subtle but sophisticated determinations," (p. 1) and "those duties often must be exercised with special care" (p. 2). Scholars have produced many theoretical,

quantitative, and qualitative analyses of the operationalization of *Daubert*, debating the relative merits of each of the criteria; considering how judges are deciding on admission, the extent to which judges are able to apply the criteria; as well as assessing various forensic methods using the *Daubert* criteria. Many have found the *Daubert* criteria wanting, as well as doubting the ability, or willingness of judges to apply them strictly. Moriarty and Saks (2005: 29) concluded that "some forensic sciences have been with us for so long, and judges have developed such faith in them, that they are admitted even if they fail to meet minimum standards under *Daubert*. Faith, not science, has informed this gatekeeping." In their major report "Strengthening Forensic Science: The Path Forward," the National Academy of Sciences was pessimistic about the contribution that could be made by judges and their gatekeeper role in preventing "junk science," concluding that "*Daubert* has done little to improve the use of forensic science evidence in criminal cases" (NRC 2009: 106). Their research found that US appellate courts were too deferential to admissibility decisions made by trial judges and were simultaneously being too generous in admitting prosecution expert evidence while generally excluding expert evidence for the defense (NRC 2009: 96).

Both Canadian and Australian State and federal legal jurisdictions have seen expert evidence and forensic science playing a role in wrongful convictions. In both countries, public inquiries and Royal Commissions following exonerations have driven forensic science policy and reform. In Canada, the case of *Mohan* [*1994*] *2 SCR 9* established a four-part test for expert evidence, requiring that it be (1) relevant, (2) necessary in assisting the trier of fact, (3) not otherwise subject to an exclusionary rule, and (4) given by a properly qualified expert. The subsequent Canadian Supreme Court cases of *R v J-LJ* [2000] 2 SCR 600 & *Trochym* [2007] 1 SCR 239 affirmed that there are enhanced tests of reliability for expert evidence and courts must particularly scrutinize novel science or methodologies, similar to the approach in *Daubert*.

The 2008 Inquiry into Pediatric Forensic Pathology in Ontario (the Goudge Report) inquired into a series of wrongful convictions relating to the pathologist Charles Smith. The report affirmed that judges play "an important role in protecting the legal system from the effects of flawed scientific evidence" and that "judges bear the heavy burden of being the ultimate gatekeeper in protecting the system from unreliable expert evidence" (Goudge Report 2012: 470). Goudge asserts that "trial judges should be vigilant in exercising their gatekeeping role" and that a test of reliability is embedded within the *Mohan* test. Evidence must thus be excluded by judges if not satisfying standards of threshold reliability, whether or not the science is novel (Recommendation No. 130). The report stressed that judges needed to pay close attention to the methodological and reliability issues identified in *Daubert* (pp. 483–484). Enhanced judicial education was also recommended to enable judges to undertake their gatekeeping role competently.

Similarly, Australia has suffered wrongful convictions that have led to Royal Commission reports highly critical of scientific evidence. In 1987, Judge Morling released a report into the Azaria Chamberlain conviction that dismissed the majority of the prosecution's scientific evidence and saw the conviction overturned. Previously, in 1984, the Shannon Royal Commission into the conviction of Edward Charles Splatt had implicated flawed scientific evidence which led to his release and pardoning. Such Royal Commissions have seen improvements in forensic science provision across Australia. However, legal reforms have been more fitful and uneven across the continent.

Australian courts follow a variety of state, federal, and common law, with many adhering to uniform evidence legislation which admits opinion evidence under s. 79, where the opinion must be (1) relevant; (2) from a person who has specialized knowledge; (3) the specialized knowledge is based upon the person's training, study, or experience; and (4) the opinion is wholly or substantially based on that specialized knowledge. However, the legislation does not

define "specialized knowledge" or require certain criteria for the "field of expertise" to be met. This has given rise to debate about the role of reliability. In *HG v The Queen* (1999) 197 CLR 414, the common law is cited as requiring an expert's knowledge or experience to be in an area "sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience" (at 58). However, the New South Wales Court of Criminal Appeal has said that evidentiary reliability is not a consideration under s79 (*R v Tang* (2006) 161 A Crim R 377; [2006] NSWCCA 167). The focus of attention must be on "specialized knowledge," not on the introduction of "an extraneous idea such as reliability" (at 137). For a country that has seen wrongful convictions based upon unreliable expert evidence, this is a worrying judgement indeed.

Presently the English and Wales legal system operates a "case-by-case" assessment of experts (their evidence tested via cross-examination), which has on occasion proved flawed. Expert opinion evidence is admissible under *R v Turner* [1975] QB 834, where "an expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. . .." In recent years, judges have approved and adopted the South Australian case of *Bonython* [1984] 38 SASR 45, which requires consideration of the subject matter of the expert's opinion, considering whether it "forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience"(at 47). This still stops short of an explicit or stringent gatekeeping role for English and Welsh judges, an omission that the Law Commission of England and Wales in their 2011 report on expert evidence is hoping to fill. Their Draft Bill seeks to introduce a statutory reliability test for expert evidence, requiring the party wishing to rely on the evidence to demonstrate that it is sufficiently reliable to be admitted. It is intended that this will be an enhanced test of admissibility, with a suggested list of criteria for judges to consider.

Future Directions

Given the difficulties highlighted with the gatekeeping role of the judge and the vagaries of expert evidence admissibility at trial, it may be more prudent to ensure the reliability and validity of scientific evidence *prior* to admission at trial. Indeed, given that most wrongful convictions have at their core defective investigative decision making, it is vital that forensic evidence utilized by investigators is reliable to ensure decisions made at this stage are based upon sound evidence. If forensic evidence is flawed at the investigative stage, it is often too late, and the damage irreversible at trial. Given then that it is essential that all forensic evidence is reliable and valid, whether used at trial, during an investigation, or held as "intelligence" by law enforcement agencies, there must be systems in place to ensure the quality of forensic evidence from the outset of the criminal process. This requires regulation and oversight of forensic science from the crime scene to the courtroom and quality assurance standards for the education, training, and operation of forensic scientists and the quality assurance and accreditation of their working environments and practices.

During the massive expansion of forensic science provision in the late twentieth and early twenty-first centuries, there have been a series of reports commenting upon forensic services. In England and Wales, the Royal Commission on Criminal Justice of 1993 (The Runciman Report) made 13 recommendations specific to forensic science. Of these, the establishment of an oversight body was deemed a priority. A subsequent report into serious contamination at a military forensic explosives laboratory by Professor Caddy in 1996 recommended the creation of an "Inspectorate of Forensic Sciences" and advocated the registration of individuals as forensic practitioners, a call repeated by the House of Commons Science and Technology Committee (2005), when it proposed greater regulation of forensic science. In 1999 the establishment of the Council for the Registration of Forensic Practitioners (CRFP) sought to register "competent" forensic practitioners. However,

the CRFP stopped far short of bringing rigorous scrutiny to bear upon forensic science and in 2009 was closed in the light of financial difficulties, lack of stakeholder support, and the newly created Forensic Regulator role.

The role of the UK Forensic Regulator was created in 2007 and was tasked with establishing and monitoring quality standards and oversees accreditation via the UK Accreditation Service (UKAS) using the international laboratory testing ISO17025 standard, necessitating UKAS establish supplementary standards and modifications to tailor the standard to forensic science. However, there remain questions over whether regulation reforms are being applied equally to all aspects of forensic science. On the one hand, the introduction of the regulator was presented as creating a generic standard for forensic science providers in the UK and "a light touch" in steering service providers. However, there remain concerns about a perceived lack of teeth and gaps in regulation, with a fear that accreditation may prove to be superficial. The regulator also faces serious resource restrictions.

There is increased recognition in the USA for the need for proper regulation and oversight of forensic science. The New York State Commission on Forensic Science which accredits and monitors forensic laboratories was established in 1994 and in Texas in 2005; the legislature established an independent oversight body for forensic laboratories to identify and oversee rectification of problems that have blighted forensic science in that state. Despite such innovations, in February 2009, the National Academy of Sciences report, *Strengthening Forensic Science in the United States: A Path Forward*, is almost unremittingly condemnatory. This critical tone was not unexpected, given that the committee had been established in the wake of high-profile failings and against a backdrop of the ongoing exoneration of innocent people, convicted often with the aid of flawed or misrepresented forensic science. In addition, the USA was still struggling to make inroads into significant backlogs in forensic laboratories despite increases in federal funding. The report unsurprisingly found serious issues facing forensic science and concluded that any remedy would have to be national in scope and demands both leadership and funding.

In July 2012 legislation was introduced to the US Congress to help prevent wrongful convictions by bringing reliable, science-based standards to forensic evidence. The Forensic Science and Standards Act of 2012 seeks to strengthen forensic science and standards: "yielding evidence that judges, prosecutors, defendants, and juries can fully trust." The Forensic Science and Standards Act of 2012 would require the National Institute of Standards and Technology (NIST) to develop forensic science standards while a Forensic Science Advisory Committee ensure the implementation of standards. Further, a National Forensic Science Coordinating Office, housed at the National Science Foundation (NSF), would also develop a strategy to support a forensic science grant program to promote research.

With international forensic data exchange increasingly common, quality standards for forensic science have become ever more important. The requirement that forensic science providers have demonstrable quality standards and accreditation has now been mandated with EU Council Framework Decision 15905/09. Accreditation of laboratories to the ISO17025 standard was viewed as providing "mutual trust in the validity of the basic analytic methods used," although it does not mandate particular methods to be used, only that the method be suitable for its purpose. This decision only covers laboratories, omitting any quality oversight of the retrieval of forensic information, whether at crime scenes or in police stations, for example, its scope restricted to the results of laboratory activities.

It is unlikely that any standard can regulate every aspect of a forensic practitioner's work. The lack of oversight of crime scene examination and evidence retrieval will be very difficult to overcome, particularly where police personnel are working in their domains without external supervision or oversight. Well over half of forensic science services (measured by cash value) in England and Wales are delivered within police forces' own scenes of crime operations and scientific support services, with this set to increase. These services are not yet subject to the same

quality standards regimes as apply to commercial providers. Yet differential standards operate against the public interest, increasing the risk of flawed results being relied upon, or challenged in the courts. In many countries, all forensic science services come under the auspices of the police, with their accreditation status and quality assurance regimes unknown. The use of personnel directly employed by the police has been roundly criticized by all reports looking into forensic science. Indeed, high-profile wrongful convictions in England and Wales were tainted by the suspicion that scientists had been too easily influenced by the police when undertaking testing and reporting results. The US National Research Council (2009) report specifically recommends that all forensic laboratories be removed from law enforcement premises and/or their administrative authority.

Despite the overwhelming support for a stronger and more regulated range of forensic services, difficulties persist. There remains the ever-present problem of funding: to oversee all forensic science provision to a standard which some would still view as inadequate has required considerable investment. It is also dangerous to implement quality standards and operating procedures that are not underpinned by rigorous scientific research, yet it is this lack of underlying "science" that has been most strongly criticized. Significant investment in research is still required prior to regulation. Further, the proper extent of the reforms in the forensic area, as opposed to their direction, remains largely unconsidered. For example, it might be asked why fingerprints are currently collected and analyzed by the police without reference in the vast majority of cases to scientists or independent laboratories. The answer seems in the main to be historical; fingerprinting was developed by the police themselves two or three decades before the establishment of formal laboratories. Thus, forensic science should be defined in wide terms and regulators given a wide remit if the quality of justice is to be improved.

Another problem concerns how forensic evidence is handled and the particular danger that tests adverse to the contentions of the prosecution will be disregarded and suppressed. This leads to the observation that acceptable forensic detection ultimately depends not only on the imposition by society of training, rules, sanctions, and supervision but also on the internalization by scientists of the ethics behind that training. As has been found to be indispensable in relation to police interrogation practices, it is necessary to impact upon the whole culture with which the police approach investigations. A corresponding approach to forensic evidence should spark further debate as to qualifications and training.

Despite almost comprehensive favorable media representation, forensic science has not eradicated the potential for factual errors in legal investigations and criminal trials resulting in wrongful convictions. While the realization of the extent of human unreliability has grown at the same time as scientific and technological power and knowledge have increased, undoubtedly preventing many wrongful convictions, they may still flourish in a culture which fails to properly scrutinize and question forensic evidence. Research into the causes of wrongful convictions clearly demonstrates that while the utilization of forensic evidence can assist the pursuit of justice, it can also seriously hamper fact finders and triers of fact in criminal cases.

One attempt to prevent wrongful convictions has been in the development of evidentiary rules to prevent flawed scientific evidence from entering the courtroom, empowering judges to rule questioned scientific evidence inadmissible. However, such admissibility standards have also been criticized, with commentators concluding that there remains a "conspicuous need for further refinement and greater vigilance to make these standards effective" (Edmond and Roach 2011).

While forensic scientists have joined calls over the years for better regulation, to provide assurance to the courts that experts before them will be qualified, and their evidence valid and reliable, there remain serious limitations to current regulation that means that the gatekeeping role of judges in courtrooms remains as vital as ever. The task cannot be left to judges alone however. Without "good" forensic science, authorities run the risk not only of wrongful convictions but also a loss of public confidence in the

criminal justice system. It is critical that attention be paid to the delivery of forensic services: how scientists are trained and standards are set, monitored, and maintained across the forensic science sector. If this were to be done to a high standard, then the burden upon judges in their role as gatekeeper and the opportunities for error would be lessened.

Related Entries

- ▶ Behavioral Science Evidence in Criminal Trials
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- ▶ Scientific Evidence in Criminal Adjudication
- ▶ Scientific Evidence in Criminal Prosecutions
- ▶ Transnational Exchange of Forensic Evidence
- ▶ Wrongful Convictions in the Inquisitorial System

Recommended Reading and References

Beecher-Monas E (1998) Blinded by science: how judges avoid the science in scientific evidence. Temple Law Rev 71:55–102

Danaher J (2011) Blind expertise and the problem of scientific evidence. Int J Evid Proof 15:207–231

Dreyfuss R, Nelkin D (1992) The jurisprudence of genetics. Vanderbilt Law Review 45(2):313–348

Dwyer D (2008) The judicial assessment of expert evidence. Cambridge University Press, Cambridge

Edmond G (2000) Judicial representations of scientific evidence. Modern Law Rev 63:216

Edmond G, Roach K (2011) A contextual approach to the admissibility of the state's forensic science and medical evidence. University of Toronto Law Journal 61:343

Gatowski SO, Dobbin SA, Richardson JT, Ginsburg GP, Merlino ML, Dahir V (2001) Asking the gatekeepers: a national survey of judges on judging expert evidence in a post-Daubert world. Law Hum Behav 25(5):433–458

Goudge Report (2012) Inquiry into pediatric forensic pathology in Ontario. Available at: www.goudgeinquiry.ca. Accessed 10 August 2012

Gross S, Shaffer M (2012) Exonerations in the United States, 1989–2012. First report by the National Registry of Exonerations. http://globalwrong.files.wordpress.com/2012/05/exonerations_us_1989_2012_full_report.pdf

House of Commons, Science and Technology Committee (2005) Forensic science on trial. HMSO, London, HC 96-1

Innocence Project (2009) Wrongful convictions involving unvalidated or improper forensic science that were later overturned through DNA testing. http://www.innocenceproject.org/docs/DNA_Exonerations_Forensic_Science.pdf

Law Commission (2011) Report on expert evidence in criminal proceedings (Law Comm. No. 325)

Moriarty JC, Saks MJ (2005) Forensic science: grand goals, tragic flaws, and judicial gatekeeping. Judges J 44:16–33

National Research Council (2009) Strengthening forensic science in the United States: a path forward, committee on identifying the needs of the forensic, sciences community. http://www.nap.edu/catalog/12589.html

Neufeld P, Garrett B (2009) Invalid forensic science testimony and wrongful convictions. VA Law Rev 29(1):1–97

O'Brien WE (2003) Court scrutiny of expert evidence: recent decisions highlight the tensions. Int J Evid Proof 7:172–184

Odgers SJ, Richardson JT (1995) Keeping Bad science out of the courtroom – changes in American and Australian expert evidence law. UNSW Law J 18:108

Redmayne M (2001) Expert evidence and criminal justice. Oxford University Press, Oxford

Risinger M (2000–2001) Navigating expert reliability: are criminal standards of certainty being left on the dock? Albany Law Rev 64:99–152

Roach K (2009) Forensic science and wrongful convictions: some lessons from comparative experience. Jurimetrics J 50:67–92

Ross A (1998) Controversy corner: the quest for truth. Aust J Forensic Sci 30(1):41–44

Legal Status of Abortion

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Overview

The moral issues in regard to the proper legal status of abortion do not involve a dispute over fundamental demonstrable facts but rather concern a myriad of considerations that lie beyond empirical verification or dismissal. It is this ambiguity that allows the dispute to be so contentious and continuous. There also is considerable argument but few facts concerning the consequences of the triumph of either the pro-choice position favoring legal abortions or the pro-life position that advocates that there be no government-accorded right to an abortion. Some pro-lifers, although by no means all, qualify this last view by granting the right to an abortion when a conception is the result of rape or incest or if the abortion seems necessary to save the life of the pregnant woman. When the "health" of the women becomes a proabortion criterion – especially her mental health – pro-life forces tend to object on the ground that pro-choice proponents define "health" so loosely that it would allow abortions almost at will. The incest exception also can be controversial. Most incest likely occurs between teenage and somewhat older brothers and sisters: should abortions be allowed in these instances if they are otherwise banned?

Key Issues

Some people note that permissible abortions detract from the population growth, although there is no agreement whether this is a good or an undesirable consequence. There also are those who insist that if legal abortions were not available, nearly as many women who now have them would choose illegal ways to get rid of the embryo growing inside them. Disputes can become highly emotional with the pro-choice advocates publishing frightening scenarios depicting poor and desperate women resorting to back-alley quacks or to dangerous folk remedies to deal with what they regard as an intolerable situation. Botched amateur abortion procedures can prove fatal; the pro-choice forces point out that the death rate from legal abortions, which increases with the length of the pregnancy, is about 0.7 per 100,000 operations (Bartlett et al. 2004). Depending on the source you rely upon, the death rate for legal abortions may or may not be higher than that in which pregnancies are carried to term. The pro-choice forces, for their part, often employ grisly pictures of aborted matter, particularly in regard to late-stage abortions when the images bear obvious humanlike features.

There is among the pro-life advocates a belief that permissible abortions are evidence of the trend toward more degeneracy in the United States, part of a burgeoning spirit that favors self-interest over social and moral imperatives. Others believe that permitting legal abortions demonstrates the freedom that should characterize a democratic society.

In terms of empirical evidence, some scholars have reported that the number of what they label "marginal children" is decreased by the availability of legal abortion. They maintain that cohorts of children born after legalized abortion have experienced a significant reduction in the number of adverse outcomes compared to the average child and that the "marginal child [who was aborted] would have been 40–60 % more likely to live in a single-parent family, to live in poverty, to receive welfare, and to die as an infant" (Gruber et al. 1999, p. 269). Others maintain that abortion has contributed to a decline in the rate of juvenile delinquency and crime (Donahuse and Levitt 2001). That finding, if accurate – it is disputed by Joyce (2003) – would have to be considered with a research conclusion that having a baby significantly decreases the likelihood of delinquency among adolescent girls (Hope et al. 2003). Pro-lifers generally find such studies unpersuasive, declaring that alternative explanations are just as plausible for the reported results, and, besides, the outcomes, even if accurate, do not

make what they consider to be fetal homicide either justifiable or excusable.

For the pro-life group, a fundamental moral consideration is that for them at the moment of conception the embryo becomes a human being and has the right to have his or her life sustained. Some regard this as a sacred right and rely on biblical sources to make their case; others see the issue as one of secular morality. Carried to its logical extreme, this position regards abortion as murder, though only extremely rarely do pro-life people maintain that women who have abortions ought to be tried in criminal courts for homicide.

For the pro-choice camp, the decision whether to carry the fertilized embryo to term should be the woman's because her body is deemed to be her personal domain. They maintain that the state has no right to demand that a woman give birth to what is now in her womb. Those adopting this position have to grant that the state often intrudes to dictate what they must do with their body, such as put it inside a classroom in their early years.

Some in both the pro-life and pro-choice camps believe that the father of the child should have a voice in the decision about whether or not an abortion ought to be elected. If the couple is not married, nor a pair, advocates of this position typically agree that the responsibility to raise the child should be totally on the man who objects to an abortion. The subtitle of a law review article illustrates how some women feel about any involvement of a putative father-to-be: "A Women's Womb is not a Man's Castle" the subtitle reads; the text of the article notes that in law the unwed father has no rights and to afford him any would make a woman's right to an abortion "virtually meaningless" (Preshiran 1990, p. 1365).

Roe v. Wade

The clash between opposing views about abortion began most dramatically after a Supreme Court opinion – *Roe v. Wade*, handed down in 1973 – decreed that under the umbrella of the judicially decreed doctrine of privacy abortions must be legally available to women in the first trimester of pregnancy. During the decades, since the *Roe* decision, pro-choice advocates have whittled away at the Supreme Court opinion, hedging it with requirements that make access to abortions more burdensome.

A major pro-life group goal is to have the Supreme Court, if it is reluctant to overturn *Roe v. Wade*, to alter its ruling by declaring that abortion is not a federal matter but that individual states should be allowed to adopt whatever rules they desire in regard to abortion. Justice Antonin Scalia, who strongly supports this view, has declared that the Court should repudiate *Roe*, which he sees as the Court's "self-awarded sovereignty over a field in which it has little proper business" (*Webster v. Reproductive Health Services* 1989, p. 532). A result of state control of abortions obviously would be that persons living in a state such as Utah who desired an abortion would have to travel to a state such as California to undergo the procedure. Obviously, the less affluent would be most affected if the states were to determine their position on abortion.

The pro-choice advocates, since they continue to retain the right to a legal abortion, have largely been relegated to a defensive position, trying to erect barricades against the incremental advance of the agenda of the pro-life forces who have benefited by having a Supreme Court with a conservative majority that recently had the very unlikely arrangement of six Roman Catholic justices (all but one a conservative) and three Jews (all liberals) sitting on the nine-person bench.

South Dakota and Abortion

In 2011, as illustrative of the whittling away process, the South Dakota legislature, with a three-to-one majority of Republicans, enacted the first statute in the nation that requires women seeking abortions to undergo a consultation at a "pregnancy help center" where they are to be informed what assistance is available "to help the mother keep and care for her child." The statute also established the nation's longest waiting period – 3 days – after an initial visit with an abortion provider before the procedure can be

done. About half of the states in America have a 24-h waiting period – none, until South Dakota's action, any longer than that. It is presumed that the waiting period, the extra trip to the sites for counseling, and the cost of overnight stays will deter some South Dakota women from seeking abortions. Since no doctors in South Dakota will perform abortions, women in the state who desire abortions are dependent upon physicians who once a week fly into South Dakota from Minnesota.

When signing the legislation into law, South Dakota's governor wrote that he hoped that women considering abortion will use the 3-day waiting period to become "as fully aware as possible of the implications of the grave decision to terminate the most sacred gift of life." The governor praised the law as promoting "voluntary, uncoerced, and informed" decision-making in regard to abortion. He presumably had in mind husbands, family, friends, or others who might encourage an abortion when he employed the word "uncoerced," but opponents found the usage ironic in view of the fact that the required counseling would be by individuals without accreditation who are personally committed to the pro-choice ideology. One of the counseling sites, the Alpha Center in Sioux City, for example, had declared that abortions increase the risk of breast cancer, infertility, and depression, a conclusion decried by the most reputable scientific studies (see, e.g., Varmos 2003).

A Democrat member of the South Dakota legislature expressed the basis for her opposition to the new law, stating that "South Dakota women should not need any in-person lecture from an unqualified, uncertified faith-based counselor or volunteer at an anti-choice clinic" (Sulzberger 2011).

In 2011, the eighth circuit of the federal appellate court upheld the constitutionality of the major elements of the South Dakota law, including the fact that the person seeking an abortion must be told that what she was contemplating would "terminate the life of a whole. separate, unique human being." At the same time, the court ruled against the requirement that the woman should be informed that her behavior increased the risk of "suicide ideation" and suicide itself. The court maintained that there was no satisfactory evidence to support this conclusion. Critics would argue that the same was true of the "unique human being" message. In 2012, the legislature mandated that abortion counselors must be certified but rejected a proposal that the doctor and the proposed patient could conduct their business on the telephone, thereby avoiding the possible expenses of an extra trip to the abortion site.

The Personhood Movement

The boldest drive by the pro-life forces has involved an effort by a group called Personhood USA to sponsor referendums that seek to alter state constitutions so that a fetus at the moment of fertilization is deemed to be a human being and its destruction therefore becomes a grave criminal offense. The proposed amendment makes no exception for fertilizations that were the consequence of rape or incest or that were found to be likely to produce seriously deformed children. An egg fertilized in a test tube was also to be regarded as a person.

A Personhood initiative in November 2011 appeared on the ballot in Mississippi, arguably the most conservative state in the nation. Proponents thought its passage would be a slam dunk and were stung when it went down to defeat by a 58–42 % vote. Many persons who opposed legal abortion voted against the measure because they believed it was too broad and overly ambiguous. Some pro-lifers also thought that the measure was certain to be struck down by the courts and thus would set their movement back in the minds of the public. There also was voter concern that the measure would have implications for the legality of some birth control procedures such as the use of intrauterine devices that allow egg fertilization but prevent the embryo from attaching to the uterine wall. Supporters of the initiative maintained that many of the views of opponents were scare tactics and not realistic assessments of the proposed measure (Markoe 2001, December 13).

The Mississippi legislature responded to the Personhood proposal's defeat by placing particularly cumbersome restrictions on which doctors could do abortions and where they must be granted permission to do so. A temporary injunction against the law was granted in mid-2012 (*Jackson Women's Health Organization v. Currier* 2012), but the case is likely to be under legal review for a considerable time. About 2,200 abortions were performed in 2010 in Jackson, the site of the only clinic in Mississippi offering the service.

Religion and Abortion

Catholicism

The hierarchy and communicants of the Roman Catholic Church constitute major supporters of the pro-life movement. Catholics, the country's largest religious group, make up 24 % of the population of the United States. Clearly, not all Catholics follow every church doctrine literally, and a large number of individuals with other religious affiliations and many with no such allegiances are part of the pro-life camp.

The historical record shows that in earlier times the core issue for Roman Catholic theologians regarding abortion was the question of "ensoulment," that is, when the soul unites with the body to produce an actual human being. For some time, Catholic authorities held that abortion during the initial stages of pregnancy did not constitute a religious sin because the soul had not yet entered the fetus. St. Augustine in his fourth-century writings declared that the amalgamation of body and soul did not take place until the time of fetal quickening, which usually occurs during the fifth month of pregnancy with the development of the spinal cord. Pope Innocent III, the church leader from 1198 to 1216, set the dividing line for when abortion became a mortal sin at 40 days after conception for a male fetus and 80 days for a female fetus, numbers based on the time when it became possible to determine genital development in spontaneously aborted fetuses. In practice, since the gender of the gestating fetus was unknowable at the time, 80 days became the sanctioned time for a legal abortion (Asma 1994). The problem the church faced was that in regard to ensoulment, the task of sustaining its legitimacy was made significantly more difficult by virtue of the fact that religious conceptions of the soul are often hybrids of fundamentally inconsistent notions.

The current position of the Catholic Church regarding abortion was forcefully enunciated by Pope Benedict XVI in 2010:

> From the moment of its conception life must be guarded with the greatest care. With regard to the embryo in the mother's womb science itself highlights its autonomy, its capacity for interaction with the mother, the coordination of biological processes, the continuity of development, the growing complexity of the organism.
>
> It is not an accumulation of biological material but rather of a new living being, dynamic and marvelously ordered, a new individual of the human species. This is what Jesus was in Mary's womb; this is what we all were in our mother's womb. We may say with Tertullian, an ancient Christian writer, "the one who will be a man is one already"[Bindley 1890, ch. 9], there is no reason not to consider him a person from conception. (Benedict 2010)

The Pope's statement represents a departure from the Church's earliest emphasis on allowing abortions until ensoulment. That criterion, obviously lying beyond any possibility of demonstration, was open to being scorned by nonbelievers as no more than folklore. To declare that humanity begins at birth is a much less vulnerable position. The best that skeptics can say is "Maybe so, maybe not." Pro-choice advocates might add that they resent having the church's arguable interpretation determine their personal behavior in regard to whether or not to undergo an abortion.

Abortion in Brazil

The United States has the fourth largest number of Roman Catholics of any country in the world. As the largest religious group in the United States, the Church is able to influence to some extent the alignment between its doctrines and secular law. In Brazil, which has the largest number of Catholics of any country, the Church, home to 75 % of the country's population,

inevitably exerts a great deal more power over daily affairs than it does in the United States.

Brazilian law permits abortion in cases of rape and in circumstances in which giving birth could cause the death of the pregnant women. To perform an abortion on oneself or another person carries the possibility of a 3-year prison term.

The status of abortion was vaulted into the limelight in Brazil in 2009 when it became known that a 9-year-old girl had undergone a medical abortion in the city of Recife after she was made pregnant with twins by her 23-year-old stepfather. The doctors claimed that the girl's 80-lb body was not mature enough to give birth safely. Church authorities retorted that the doctors could have resorted to a Caesarian section to bring the twins into the world.

The rift between church and state came into play when the Church excommunicated the girl's mother (but declared there was no theological doctrine to allow it to do so in regard to the stepfather) as well as all members of the medical team that had participated in the abortion. The President of Brazil deplored this action. The Archbishop replied that the President ought to study up on his theology. "We know people have other ideas," the Archbishop declared, "but if they do they are not Catholics. We want people who adhere to God's word." The Archbishop later added: "Abortion is much more serous than killing an adult. An adult may or may not be innocent, but an unborn child is most definitely innocent. Taking that life cannot be ignored" (Downie 2009).

The statistics concerning aspects of the abortion phenomenon in Brazil portray a situation difficult to interpret. There were 3,093 legal abortions performed in the country from January to November of 2008. The Ministry of Health indicates that 200,000 women, almost all of them Catholics, appear at hospitals or medical clinics each year for treatment for errant illegal abortions. It is estimated that there are about 14 million clandestine abortions performed in Brazil annually. Yet, 67 % of the population responding in a national poll indicated that their preference is to leave the law as it is (Downie 2009).

Abortion and Other Religions

Protestants

Protestant religions run a gamut in regard to abortion, although the most prominent tendency is to echo the Catholic Church's position but less categorically, lest the ministers offend too many communicants. A policy statement by the Evangelical Lutheran Church in America, for instance, reads as follows:

> . . .the number of induced abortions is of deep concern to this church. We mourn the loss of life that God has created. Abortion ought to be an option only of last resort. Therefore, as a church we seek to reduce the need to turn to abortion as the answer to unintended pregnancies. (Baker and Ehlke 2011, p. 122)

The "ought" in statement is somewhat equivocal, and the words "we seek" do not suggest as vigorous a condemnation of abortion as that promulgated by Catholic theologians.

Mormons

The Church of Latter-Day Saints (Mormons) allows abortions under limited circumstances (rape, for instance) but advises that those contemplating the procedure first consult with the local presiding church authority and then go ahead only after receiving divine conformation of their decision through prayer (Hunter 1990).

Judaism

We can examine the theological position of Jews as an interesting example of an approach that, depending on which segment of the religion a communicant adheres to, comes close to or differs notably from Catholic doctrine.

In terms of theology, Jews divide into three major subgroups: Orthodox, Conservative, and Reform. The issue of Jews and abortion is more complex than with Catholics because there is no one person, such as the Pope, who can put forward a position that would represent the official stance for all the observant.

Orthodox Jews oppose abortion except under very limited circumstances, while some conservative and reform rabbis take the position that a fetus is not a person until some segment of the

birthing baby moves outside the mother's body. Theology aside, Jewish authorities find themselves faced with a survival problem that tilts them away from endorsing abortion. In the United States, about half of the Jews marry outside their religion, and their children may or may not be raised in the Jewish faith. Besides, the Jewish birth rate is not sufficiently high to reach replacement levels.

Orthodox Jewish theology takes a position opposite to that of the Catholic Church on the priority of mother and fetus in instances when a decision has to be made which of the two is to be sacrificed to save the other. A one scholar has enunciated Jewish doctrine: "If a woman suffered hard labor in travail, the child must be cut up in her womb and brought out piecemeal, for her life takes precedence over its life; if the greatest part already has come forth, it must not be touched, for the claim of one life can not supersede that of another" (Zoloth 2003, pp. 40–41).

Attitudes Toward Abortion

A comprehensive analysis of the views regarding abortion among white and black men and women from the 1970s date demonstrated shifts over four decades. Factors said to have had an impact on these swings include the increase in female participation in the labor force, the alterations in the extent of nonmarital sexual activity (a dramatic upward move followed by a decline after the appearance of the AIDS epidemic), the further secularization of the society, the increase in educational attainments, the decreasing vitality of the feminist movement, and the growing vigor of the antiabortion movement (Carter et al. 2009, p. 3).

The trend analysis is based on the results of the General Social Survey that questions a representative sample of noninstitutionalized English-speaking adults in the United States. Abortion attitudes were determined by a composite score based on answers to seven questions, asking the respondent if he or she favored allowing abortion under each of the following conditions:

1. If there is a strong chance of a defect in the baby?
2. If she is married and does not want any more children?
3. If the woman's own health is seriously jeopardized by the pregnancy?
4. If the family has a very low income and cannot afford any more children?
5. If she becomes pregnant as a result of rape?
6. If she is not married and does not want to marry the man?
7. The woman wants it for any reason?

The was a slight decrease in support for abortion during the 1980s compared to the period between 1973, when *Roe v. Wade* was decided, and the following decade. That decline has been tied to the influence of President Reagan's antiabortion views but, of course, could have been a cause for his election. White males have been and remain the most liberal of the demographic groups studied when it comes to abortion attitudes. White females are the second most liberal group followed closely by black females and black males. The striking decline in support for abortion among black females from the 1980s to 2008 brings their score close to the point at which it stood in the 1970s before a dramatic rise from the 1980s to the 1990s. It is black males who show the greatest increase in support for abortion between the 1970s and current times (Carter et al. 2009).

Abortion and the Law

Frederick J. Tausig, a leading authority on abortion, observed of the pre-*Roe* days that he knew of "no other instances in which there had been such frank and universal disregard for a criminal law" (Taussig 1936, p. 422). There are greatly varying estimates of the number of illegal abortions in the United States that set the annual figure for the years right before the *Roe* decision at about 200,000–1.2 million. If all women who underwent illegal abortions then were included in the crime statistics, the female crime rate would have far exceeded that for males. In practice, sanctions were not applied to women who had abortions but to those who performed

them. Most often, this happened when the aftereffects of the procedure brought the woman to a hospital. There she sometimes offered or was persuaded to testify against the abortionist (Regan 1997).

As with many highly controversial issues in the United States, such as racial desegregation, it was the judiciary that took the lead in endorsing the dramatic national shift in abortion practices. Part of the reason for this is that federal judges are appointed for life and need not be unduly concerned about public disfavor with their decisions. Presidents, governors, and legislators, if they want to remain in office, cannot afford to alienate too significant a portion of their constituency and often decide to stay on the sidelines in regard to actions that might split the public.

Fifteen states had already relaxed restrictions on abortion by 1973. In tandem with *Roe v. Wade*, the 7–2 Supreme Court decision that allowed abortions to be performed legally throughout the nation during the first trimester of pregnancy, the *Doe v. Bolton* (1973) opinion delivered the same day declared unconstitutional a Georgia law requiring that a doctor's decision regarding abortion had to be confirmed by another doctor or a committee and had to be performed in a hospital. Among the forces that appeared to underlie the *Roe* decision was the power of the feminist movement, particularly in terms of the considerable number of women moving into the work force. Birth control pills (replacing more cumbersome and less employed means of contraception) and the growing use of condoms called into question the inviolability of the birth process, since it could readily have been prevented before it began. Condoms became available in college campus restrooms, and birth control pills often sit on the kitchen counter, waiting to be swallowed with orange juice at breakfast.

Parental Notification

The matter of parental notification became the first major abortion battleground. In *Planned Parenthood of Kansas City, Missouri v. Ashcroft* (1983), the US Supreme Court ruled that it was constitutionally acceptable to demand that minors inform their parents of the intention to have an abortion; in some instances, telling a judge could substitute for parental notification. By 2012, in 22 states a parent had to consent to the procedure and in three of these, both parents. In 11 states, a parent only had to be notified and in one of these, both parents. In seven states, the parental notification had to be notarized. In the remaining states, an abortion could be had by a minor without parental involvement.

The irony in the success of the campaign to incorporate parental notification by underage women in the requirement for an abortion surfaced in a later study that indicated that the ruling appeared to have produced only a scant effect on teenage abortions. In Tennessee, for instance, the abortion rate went down after a federal court put a parental notification law on hold but increased when the requirement was reinstated. The rate of abortions fell in Texas after parental notification was mandatory but not nearly as much as it had dropped before then. All told, the study found "no evidence that the laws had a significant impact on the number of minors who got pregnant, and, once pregnant, the number who had abortions" (Lehren and Leland 2006, p. A1).

The *Webster* Case

An important victory for pro-lifers came 16 years after *Roe* when the Supreme Court in *Webster v. Reproductive Health Services* (1989) upheld the constitutionality of a Missouri law that prohibited the use of public facilities, such as municipally owned hospitals, to perform abortions, except when necessary to save a woman's life. The Missouri law also disallowed public funding for programs that included proabortion counseling. The court further agreed that a doctor could be required to inform a pregnant woman seeking an abortion whether her fetus was viable and might possibly survive if delivered prematurely.

The *Casey* Case

The Supreme Court's ruling in *Planned Parenthood v. Casey* (1992) found the justices deciding by a five to four vote to uphold a Pennsylvania law that required a woman seeking an abortion to

listen to a lecture or watch a film about fetal development and then wait a day before undergoing the procedure. The doctor was obligated to provide information about alternatives to abortion, its medical risks, and the probable gestational age of the fetus. The doctor also had to inform the patient regarding medical benefits for prenatal care, childbirth, and neonatal assistance, among other matters. The Court, however, refused to endorse the segment of the Pennsylvania law that required the woman, unless she had compelling reasons for not doing so, to sign a statement that she had informed her husband that she was going to have an abortion.

The *Casey* decision was something of a disappointment for the pro-life camp which had thought there was a good chance that the Court would totally jettison *Roe v. Wade*. It led the antiabortion forces to decide to take a lesson from the civil rights movement and to incrementally pick away at elements of *Roe* until it had been so weakened that it would virtually fall of its own accord. They took particular heart from the clause in *Casey* that stated that the Court would be hospitable to abortion arrangements so long as they did inflict an "undue burden" upon women seeking an abortion. Pro-lifers anticipated that "undue burden" was so vague a criterion that it left a great deal of room for them to chip away at the guidelines for abortions.

Late-Term Abortions

The controversy between supporters of legal abortion and their opponents, like many campaigns for the minds of the public, has relied upon the manner in which disputed matters are worded. In the overall denotation of the two sides, those opposing abortion enjoy the verbal high ground. Pro-life is a more appealing slogan than pro-choice. Who can declare that they are not in favor of life, especially when considering its alternative? Pro-choice, on the other hand, sounds self-indulgent. Choices are always limited and where would its adherents draw the line? The unequal appeal of the way the sides have designated themselves has been noted elsewhere: "Perhaps 'pro-choice' once was good enough shorthand for liberty, human dignity, individualism, pluralism, self-government and woman's equality," writes Nancy Cohen (2010, p. A20), who then adds: "But anyone who thinks it still is sufficient as we enter our fifth decades of the cultural wars [over abortion], hasn't been paying attention." By the last, she means attention to the growing strength of the pro-life movement.

The same kind of verbal warfare was prominent in regard to what here is being called "late-term abortions." Pro-life forces defined the matter as "partial-birth abortion" and described the procedure in repellent terms. Pro-choice advocates tended to rely on the terms "dilation and extraction" (d & x) or "dilation and evacuation" (d & e), the medical designations for the procedure. These were abortions generally performed during the fifth to the sixth month of pregnancy. Estimates placed their number at somewhere between 2,000 and 5,000 a year.

The procedure was banned by the federal Congress in 2003. Signing the measure into law, President Bush noted that "for years a terrible form of violence has been directed against children who are inches from birth." The constitutionality of the measure was upheld by a 5-4 vote in the US Supreme Court (*Gonzalez v. Carhart* 2007). The law decreed a fine of not more than $250,000 and/or 2 years imprisonment for "any physician who, in or affecting interstate commerce, knowingly performs a partial birth abortion and thereby kills a human fetus." The Court's opinion noted, rather oddly, that "while we find no reliable data on the phenomenon it seems unexceptional to conclude some women come to regret their decision to abort the infant they once created and sustained" (*Gonzales v. Carhart* 2007, p. 159). This piece of obiter dicta (off-the-cuff musings not directly relevant to the case) is undoubtedly accurate, but the same can be said, perhaps more tellingly, about births – or, for that matter, about people who marry and Supreme Court judges who render decisions they come to regret.

Pro-choice groups had little leverage against the groundswell of public support in opposition to late-term abortions. The view of the liberal wing

of the medical profession was expressed in an article in the prestigious *New England Journal of Medicine*:

> This is the first time the Court has ever held that physicians can be prohibited from using a medical procedure deemed necessary by the physician to benefit the patient's health. (Annas 2007, p. 2201)

Subsequent Developments

For a time thereafter, the abortion issue was confined to the periphery of social concerns in the face of America's involvement in wars in Iraq and Afghanistan and the drastic economic meltdown in late 2008. Then abortion recaptured in headlines in March 2011 when the Republicans in Congress held up to almost the very last moment passage of a budget bill that would keep the government functioning. It was not monetary concerns that were being fought over but the Republican's demand to end all funding for Planned Parenthood, a national agency that devotes a small portion of its work to abortion. The Republicans also wanted to stop funding for abortions in the District of Columbia, which is ruled by Congress, and to end the distribution of funds to any overseas government that reallocates some part of the money to agencies encouraging or performing abortions. The dispute over these matters finally was postponed at the last moment in order to keep the government running. But the fact that abortion again has become a political issue is indicated by the fact 944 bills were introduced intro state legislatures during the first 3 months of 2012 seeking to rein in abortions (about 3 % of these bill make it into law).

The Demographics of Abortion

The most reliable statistics on abortion in the United States are those gathered by the Alan Guttmacher Institute, a nonprofit organization that conducts research on human reproduction and performs policy analyses and sponsors public education programs.

The Institute notes that there have been about 50 million abortions since the procedure was authorized by the *Roe* decision in 1973 and 2008 (2008 was the latest year for which US figures were available as late as mid-2012.4 That figure represents a decrease from the highest levels of 1.6 million in the 1980s, despite a growing population. Part of the decrease is due to the appearance of the so-called morning-after abortion pills (RU-486 or Mifepristone) that were sold over the counter to women over 18 and by prescription to those younger.

The legal abortion rates by 4-year periods are presented in Table 1.

Nearly half of the pregnancies in the United States are reported to be unintended, and 40 % of these pregnancies are terminated by abortion. Eight percent of the abortions are performed on teenagers. The figures for other age groups are 20–24 years old (33 %) and 25–29 (24 %). Women who have never married and are not currently cohabiting accounted for 45 % of all abortions, while 61 % are performed on women who already have one or more children. Twenty-eight percent of the women who obtain abortions report that they are Catholics (Jones et al. 2010).

Four of the 13 possibilities were the median number offered by the 1,160 women questioned about the reason they chose to undergo an abortion. Three-fourths cited concern for or responsibility to other individuals; three-fourths said that they could not afford a child; three-fourths said that having a baby would interfere with work, school, or the ability to care for dependents; and half indicated that they did not want to be a single parent or were having problems with their husband or partner (Finer et al. 2005).

For and Against Legal Abortion

Most of the positions taken by pro-choice advocates and those favoring the pro-life positions are summarized below.

The Pro-life Claims

1. It is argued by pro-lifers that to allow legal abortion represents a wedge into more drastic reinterpretations of life and its value. They maintain that since the elderly tend to be a drain on the economy, especially in terms

Legal Status of Abortion, Table 1 Abortion rate per 100,000 women, 1973–2008

Year	Rate
1973	16.3
1977	26.4
1981	29.9
1985	28.0
1989	26.8
1993	25.0
1997	21.9
2001	21.1
2005	19.4
2008	19.48

Source: Alan Guttmacher Institute

of their pensions and medical costs, attitudes favoring abortion could readily be expanded to form a basis for a program of euthanasia directed against old people.

2. Legal abortion is said to make fetal experimentation and human cloning more acceptable, actions most pro-lifers deplore.
3. Pro-lifers maintain that many women who undergo abortions later come to deeply regret that irreversible action; therefore, all reasonable means ought to be allowed to keep them from doing something they subsequently would wish they had not done.
4. Relatively few persons, pro-lifers point out, no matter how wretched their situation may be, choose to end their lives. Nor do many people wish they had never been born. The argument is offered that the fetus being aborted has no way of registering his or her view on the matter and that pro-lifers must defend the fetus.
5. Pro-lifers believe that abortion encourages immoral behavior, such as premarital or extramarital sexual intercourse.
6. The term "genocide" is sometimes used by pro-lifers to describe what they view as the slaughter of millions of unborn human lives.
7. Pro-lifers often insist that the Supreme Court put its nose (and votes) into business that is far removed from its judicial concerns and competence.
8. In regard to *Doe v. Bolton*, pro-lifers maintain that the definition of a pregnant woman's health was overbroad and ill defined since it includes emotional, familial, and other conditions that can be employed as excuses for a self-indulgent act.
9. With ultrasound techniques now able to determine the gender of the fetus, pro-lifers note that abortion will be used to discriminate against female fetuses, skewing the population ratio and in time having far-reaching detrimental consequences for social life.
10. Pro-lifers argue that the loss of manpower and womanpower because of legal abortions creates a necessity for the United States to rely upon foreigners to maintain an adequate workforce. This necessity, they argue, has led to a considerable influx of illegal aliens who are claimed to be a drain on the economy.
11. Pro-lifers say that as a nation that largely derives its moral principles from biblical writings, we should be obligated to follow Christian theological doctrines that preach divine objections to abortion.

The Pro-choice Claims

1. Pro-choice advocates emphasize that making abortion illegal has racist implications. They point out that when abortion was against the law, fatalities from outlawed procedures were found primarily among poor minority group women.
2. Pro-choicers believe that if women bear children they do not want, they are very likely to severely undermine the quality of life in store for those children and, as a result, impose social costs upon others.
3. Pro-choicers dispute the claim that there exists biblical justification for the crusade against legal abortions and that, even if there are such doctrines, they should not be used to interfere with options available to those who do not accept them as guidelines for their own conduct.
4. While granting that it was a Supreme Court of males that enunciated the *Roe v. Wade* doctrine, pro-choicers point out that it has been only males who have allowed inroads against

the unfettered application of the original ruling. None of the women who are or have been on the court have ever voted in favor of an abortion restriction.

5. The pro-choice forces find the ideologies of pro-lifers illogical and contradictory if not hypocritical. They point out that pro-lifers tend to argue that they want the government to get off their backs, yet at the same time, they advocate that the government intrude into people's freedom by forbidding them to undergo abortions.

Conclusion

The fight (battle may be the better term) over abortion shows few signs of abating. It is difficult to think of a resolution that would appease and subdue both sides. Perhaps the best shorthand summary of the situation is that of Laurence Tribe, an eminent constitutional law professor: "What we have here," Tribe (1991, p. 6) has observed, "is a clash of absolutes."

Related Entries

- ▶ Gendering Traditional Theories of Crime
- ▶ Moral Crimes
- ▶ Sex Offenders and Criminal Policy

Recommended Reading and References

Annas GJ (2007) The supreme court and abortions. N Engl J Med 350:2200–2207

Asma ST (1994) Abortion and the embarrassing saint. Humanist 54(May-June):30–33

Baker RC, Ehlke R (2011) Natural law: a Lutheran reappraisal. Concordia, St. Louis

Bartlett LA, Berg CJ, Schulman HB, Zane SB, Green CA, Whitehead S, Atrash HK (2004) Risk factors for legal induced abortion-related mortality in the United States. Obstet Gynecol 103:729–737

Benedict XVI (2010) Celebration of first vespers of the First Sunday of Advent for unborn life. Libera Editice Vaticana, Vatican City

Bindley TH (1890) The apology of Tertullian for the Christians. Parkler, Oxford, UK

Bolzendahl CI, Myers DL (2004) Feminist attitudes and support for gender equality: opinion change in women and men. Soc Forces 83:759–789

Cahill LS, Farley MA (1995) Embodiment, morality, and medicine. Kluwer, Boston

Carter JS, Carter S, Dodge J (2009) Trends in abortion attitudes by race and gender: a re-assessment over a four-decade period. J Sociol Res 1:1–17

Cohen NL (2010) Framing today's abortion debate. Los Angeles Times, A10, 10 Apr 2010

Davis JJ (1984) Abortion and the law: what every Christian should know. Presbyterian and Reformer, Phillipsburg

Doe v. Bolton (1973) 410 U.S. 179

Donahuse JJ III, Levitt SR (2001) The impact of legalized abortion on crime. Q J Econ 116:399–420

Downie A (2009) Nine year olds abortion outrages Brazil's Catholic Church. Time World, 21–22, 6 Mar 2009

Finer LB, Frohwirth LF, Lindsay A, Dauphenee SS, Moore AM (2005) Reasons U.S. women have abortions: quantitative and qualitative perspectives. Perspect Sex Reprod Health 37:110–118

Gonzalez v. Carhart (2007) 550 U.S. 154

Gruber J, Levine P, Staiger D (1999) Abortion legislation and child living conditions: who is the 'Marginal Child'? Q J Econ 114:269–291

Haugern DM, Musser S, Lovelace K (eds) (2010) Abortion: opposing viewpoints. Greenhaven, Detroit

Hess JA, Rueb JD (2005) Attitudes toward abortion, religion, and party affiliations among college students. Curr Psychol 24:23–42

Hope TA, Wilder EI, Watt TT (2003) The relationships among adolescent pregnancy, pregnancy resolution and Juvenile delinquency. Sociol Q 44:555–576

Hull NE, Hoffer W, Hoffer PC (eds) (2004) The abortion rights controversy in America. University of North Carolina Press, Chapel Hill

Jackson Women's Health Organization v. Currier (2012) 12–00436 (U.S. District Court, Southern District of Mississippi (Jackson)

Jones RK, Finer LB, Singh S (2010) Characteristics of abortion patients, 2008. Guttmacher Institute, New York

Joyce T (2003) Did legalized abortion lower crime? J Hum Resour 39:1–28

Lehren A, Leland J (2006) Parental notification has scant effect in teen abortion. New York Times, A1, A19, 6 Mar 2006

Markoe L (2010) After Mississippi defeat, what next for 'Personhood'? Christ Century 128:18, December 10

Planned Parenthood of Kansas City, Missouri v. Ashcroft (1988) 462 U.S. 476

Planned Parenthood of Southeastern Pennsylvania v. Casey (1992) 505 U.S. 802

Presshirran AM (1990) Potential fathers and abortion: a woman's womb is not a man's castle. Brooklyn Law Rev 1359–1404

Regan LJ (1997) When abortion was a crime: women, medicine and the law in the United States, 1867–1973. University of California Press, Berkeley
Roe v. Wade (1973) 410 U.S. 413
Sulzberger AG (2011) Women seeking abortions to get anti-abortion advice. New York Times, A16, A18, 23 Mar 2011
Tribe LH (1991) Abortion: clash of opposites. Norton, New York
Varmos H (2003) Summary report: early reproductive events and breast cancer workshop. National Cancer Institute, Washington, DC
Webster v. Reproductive Health Services (1989) 492 U.S. 490

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▶ Onset of Offending

Lifestyle Theory

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Synonyms

Criminal thinking model; Lifestyle theory of crime

Overview

Lifestyle theory holds that crime is a developmental process guided by an ongoing interaction between three variables (incentive, opportunity, and choice). During each phase of the criminal lifestyle (initiation, transition, maintenance, burnout/maturity), incentive, opportunity, and choice take on different values and meanings. Existential fear serves as the incentive for the initiation phase of a criminal lifestyle. Once initiated, the incentive for continued lifestyle involvement becomes a fear of losing out on the benefits of crime. By the time the individual enters the third (maintenance) phase of a criminal lifestyle, incentive has changed once again, this time to a fear of change. With the advent of the burnout/maturity phase of the criminal lifestyle, incentive has changed yet again, this time to a fear of death, disability, or incarceration. Comparable transformations take place in opportunity and choice. Current controversies include (1) generalizing results obtained from research on male prison inmates to that on female inmates and non-incarcerated offenders, (2) documenting the clinical predictive efficacy of assessment procedures designed to measure key lifestyle constructs, and (3) examining the possibility of an allegiance effect for much of the research on lifestyle theory. Open questions requiring further study include (1) investigating the hierarchical model of criminal thinking proposed by lifestyle theory, (2) exploring the role of criminal thinking

and other quasi-time-stable cognitive factors in mediating and clarifying important crime relationships, and (3) ascertaining whether the lifestyle approach to intervention qualifies as evidence based.

Introduction

The lifestyle theory of crime has its roots in Bandura's (1986) social cognitive model, Sykes and Matza's (1957) techniques of neutralization, and Yochelson and Samenow's (1976) work on the criminal personality. As such, it is designed to explain habitual criminal activity by focusing on the cognitive factors that support antisocial behavior. The cognitive-behavioral proclivities of lifestyle theory are obvious given its emphasis on cognition, behavior, and the cognition-behavior relationship. Less obvious, perhaps, is how lifestyle theory integrates cognition and behavior. This entry, in addition to describing the lifestyle theory of crime, is designed to provide the reader with an understanding of exactly how cognition and behavior interact to increase or decrease a person's risk for future criminal involvement.

Background

For much of its history, criminology has restricted itself to a small portion of the relevant data, resulting in the simplistic single-variable theories that now dominate the field. Biology and psychology have been largely ignored by criminologists and while biology and psychology are no more capable of providing a complete explanation of crime than criminology, a complete explanation necessitates their inclusion. The lifestyle theory of crime attempts to highlight psychological variables that may be helpful in explaining certain well-known crime relationships. In this vein, lifestyle theory seeks to integrate constructs from divergent conceptual models rather than perpetuate the artificial dichotomies that seem to have limited theory development in the field of criminology (i.e., classicism vs. positivism, propensity vs. development, continuity vs. change). How lifestyle theory integrates these artificial dichotomies is discussed next.

Early criminological theory emphasized the classical perspective that humans are rationale decision makers who engage in behaviors they believe will provide them with the greatest amount of pleasure and the least amount of pain. The criminal justice system still relies heavily on the classical notion that people choose to commit crime. Theoretical criminology, however, has largely rejected the notion of choice in favor of a deterministic model of criminal behavior in which crime is seen as a function of sociological and environmental factors over which the actor has no control. Lifestyle theory integrates these opposing points of view into a single perspective in which incentive (pushes from within), opportunity (pulls from without), and choice (the decision-making apparatus) are equally important in the development of criminal behavior.

Some criminological theories view offenders as *exhibiting a* propensity for crime; other criminological theories postulate that crime follows a developmental sequence or pattern. The first approach underlies the career criminal paradigm and the second approach lays the foundation for the criminal career paradigm. Lifestyle theory asserts that crime is both a propensity and developmental process and that the career criminal and criminal career paradigms, rather than being diametrically opposed, are actually complementary. Integration of the career criminal and criminal career paradigms gives rise to four overlapping but sequential phases of lifestyle development: initiation, transition, maintenance, and burnout/maturity. Certain propensities lead some individuals to drop out of the sequence during an early phase (initiation, transition) and others to avoid the sequence altogether. Alternate propensities lead some individuals to remain in the sequence or in a particular phase of the sequence longer than most people.

Continuity versus change is another dichotomy that has preoccupied the field of criminology. Some theorists conceptualize crime as a time-stable characteristic that is largely

impervious to change, whereas other theorists conceptualize crime as an unstable developmental pattern that is subject to regular and dramatic periods of change. Crime continuity, whereby past offending serves as one of the best predictors of future offending across multiple studies, is often used to support the stability argument. The age-crime relationship, in which crime peaks during mid-adolescence and then drops off sharply in late adolescence regardless of whether crime is measured with official, self-report, or victimization data, is often used to support the instability argument. Lifestyle theory agrees with both positions and integrates stability and instability into its framework by proposing the existence of quasi-time-stable cognitive and behavioral variables that give the lifestyle the appearance of being both stable and changeable.

Another dichotomy that has helped shape the lifestyle theory of crime is whether individual differences in criminality are categorical (difference in kind) or dimensional (difference in degree). This time, however, one side of the controversy (i.e., dimensional latent structure) rather than an integration of the two sides receives the bulk of empirical research support. In a recent review of the taxometric literature on antisocial personality, psychopathy, and criminal lifestyle, Haslam (2011) concludes that these crime-related constructs are dimensional rather than categorical in nature and that individual differences in these crime-related psychological constructs are quantitative (people can be ordered along one or more dimensions) rather than qualitative (people can be grouped into types or categories). Based on taxometric and confirmatory factor analytic research (Walters 2009), lifestyle theory proposes that a criminal lifestyle is composed of two overlapping dimensions: proactive criminality and reactive criminality.

State of the Art

The lifestyle theory of crime, as described in Walters (1990), has undergone several revisions and elaborations. This section on the state of the art of lifestyle theory provides a summary of the most recent version or iteration of lifestyle theory as applied to habitual criminal conduct (Walters 2012a).

Precursors to a Criminal Lifestyle

Prior to entering the initial phase of a criminal lifestyle, certain conditions are already in place. Two commonly observed precursors of a criminal lifestyle are templates and trial runs. A template consists of cultural and subcultural factors that provide a context for subsequent development of a criminal lifestyle. Sundry environmental and familial factors help shape an individual's attitudes and thinking toward antisociality and crime, which, in turn, increase or decrease the person's susceptibility to future criminogenic influences. The child's interactions with the interpersonal environment consequently form a template that makes it more or less likely that he or she will pursue criminal opportunities present in that environment. Trial runs are the individual's initial attempts to employ antisocial solutions to solve interpersonal problems (e.g., acquiring a toy they want, avoiding punishment for stealing a treat from the proverbial cookie jar). The reaction the child receives from his or her interpersonal environment will go a long way toward shaping his or her thinking with respect to future criminal opportunities.

Phase I: Initiation

The first phase of a criminal lifestyle is referred to as initiation. This phase begins with commission of the first arrestable crime and ends when the individual either adopts a conventional lifestyle or moves into the next phase of a criminal lifestyle. Each phase of a criminal lifestyle is a function of specific incentives, opportunities, and choices, around which the current discussion is organized.

Incentive: Existential Fear

Existential fear is a fear of nonbeing combined with a sense of separation and alienation from the environment. Although it is a fear shared by all humans, it is shaped and molded by a person's experiences in the survival-relevant areas of affiliation, control/predictability, and status.

Those whose fears have been shaped by affiliative concerns might experience existential fear as a fear of fitting in or being rejected. Those whose fears have been shaped by control concerns might experience existential fear as a fear of losing control. Those whose fears have been shaped by status concerns may perceive existential fear as a fear of being anonymous or unsuccessful. Existential fear serves as an incentive for behavior in that it motivates, pushes, or encourages the individual to engage in behaviors designed to reduce or alleviate the fear. The degree to which a criminal lifestyle promises the individual relief from existential fear is the degree to which the individual is motivated to enter a criminal lifestyle.

Initially, existential fear is tied to one's physical survival. It is, in effect, a manifestation of the person's survival instinct. This can become distorted over time, however, to where the individual paradoxically favors psychological survival of the lifestyle over physical survival of the organism. This is particularly true of a criminal lifestyle. Research indicates that criminality is often associated with low anxiety or fearlessness (Newman and Schmitt 1998). Lifestyle theory conceptualizes fearlessness as a relatively weak bond between existential fear and physical survival, keeping in mind that lifestyle theory is a dimensional model and that bond strength is a matter of degree rather than an all-or-nothing proposition. Because existential fear needs to be attached to something, the individual with low fearlessness will often attach their existential fear to a lifestyle. Under the proper conditions, this lifestyle could turn out to be a criminal lifestyle.

Opportunity: Early Risk Factors

Opportunity factors increase or decrease a person's risk of entering a lifestyle. In line with the criminal lifestyle's dimensional structure, no single risk factor determines a person's position on the proactive and reactive dimensions of the lifestyle; rather, it is the total number of relevant risk factors that is important (additive etiology). Some risk factors have a greater impact than other risk factors, certain risk factors interact with one another, and some risk effects are moderated by a third variable. Childhood temperament is considered a particularly salient risk factor for the purpose of initiating a criminal lifestyle. Novelty seeking, negative emotionality, and physical activity are three temperament dimensions likely to be elevated in someone at risk for future antisociality. Because childhood temperament is a function of both genetics and early environment, it demonstrates the complex interaction that exists between biological and developmental factors in the formation of a criminal lifestyle. Other risk (opportunity) factors vital during the initiation phase of a criminal lifestyle include stress, weak socialization to conventional groups, strong socialization to deviant groups, and the availability of criminal opportunities in the current environment.

Choice

Lifestyle theory rejects the hard determinism of the positivistic tradition. Even though incentive drives behavior and opportunity shapes it further, the individual still makes choices. The active decision-making that gives rise to choice is a two-stage process: generation and evaluation. The goal of the generation stage of the decision-making process is to come up with as many alternative solutions to a problem as possible. The goal of the evaluation stage of the decision-making process is to systematically and effectively evaluate the pros and cons of each alternative option. For a variety of reasons, from intelligence to experience to poor integration of decisional economics (rational choice) and emotion (empathy), the crime-prone individual often has trouble generating alternatives, properly evaluating alternatives, or both. This is a problem during all four phases of a criminal lifestyle, but during the initiation phase the issue often is resisting the powerful effects of actual and anticipated positive reinforcement for criminality (excitement, curiosity, peer acceptance). Lifestyle theory rejects traditional rational choice and deterrence theory in favor of a model that encompasses both rational and irrational choice.

Phase II: Transition

The transitional phase of lifestyle development is characterized by increased involvement in, commitment to, and identification with the criminal lifestyle. In contrast to the experimentation of the initiation phase, the transitional phase is marked by a growing sense of comfort with the lifestyle accompanied by the belief that certain basic needs will be satisfied by the lifestyle.

Incentive: Fear of Lost Benefits

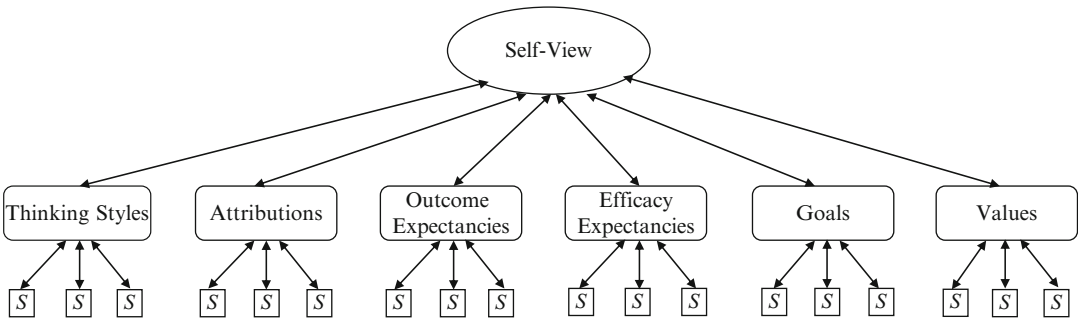
It is during the initiation phase of a criminal lifestyle that the individual comes to realize the material and psychological benefits that can be derived from being involved in a regular pattern of criminality. Existential fear facilitates the transition to a higher level of lifestyle involvement by stimulating a person's fear of losing the material (money, excitement, power) and psychological (affiliation, control, status) benefits of a criminal lifestyle. This transformation of existential fear into a fear of losing the material and psychological profits of a criminal lifestyle is instrumental in transitioning the individual to the next phase of the lifestyle whereby commitment to the lifestyle and certain corollaries (initial incarceration, labeling, rejection of conventional values) take precedence.

Opportunity: Schematic Subnetworks

With increased internalization of the criminal lifestyle, opportunity transitions from behavioral to cognitive. This is another way of saying that a person starts acting like a criminal before he or she starts thinking like one. Once the individual starts thinking like a criminal, his or her opportunities are shaped primarily by six cognitive factors known as schematic subnetworks. Lifestyle theory proposes that criminal cognition is hierarchically organized; with belief systems (self-view, worldview, past view, present view, future view) at the top of the hierarchy, individual criminal thoughts are the bottom of the hierarchy, and several layers of schematic subnetwork in between (see Fig. 1). The six primary schematic subnetworks in the lifestyle model are thinking styles, attributions, outcome expectancies, efficacy expectancies, goals, and values (see Table 1 for more details).

Choice

Decision-making tends to narrow as the individual's commitment to a criminal lifestyle grows. Many people who enter the transitional phase of a criminal lifestyle never possessed good problem-solving skills to begin with. Of those who enter this phase with adequate problem-solving skills, it is the generation stage of the problem-solving process that is most adversely affected by the individual's growing commitment to a criminal lifestyle. As the person begins narrowing the focus of his or her problem-solving deliberations to criminal options, he or she starts a process, facilitated, in part, by criminal thought patterns and other schematic subnetworks (which can be considered purveyors of irrational choice), of discarding and denigrating the noncriminal options available to him or her. Near the end



Lifestyle Theory, Fig. 1 The hierarchical organization of criminal cognition (Note. S = individual criminal thoughts or schemes)

Lifestyle Theory, Table 1 The six quasi-time-stable cognitive variables in lifestyle theory

Cognitive factor	Description
Criminal thinking	Thinking styles that support criminal behavior. The criminal thinking hierarchy is organized, from top to bottom, into a superordinate factor (general criminal thinking), two higher-order factors (proactive and reactive criminal thinking), and eight individual thinking styles (mollification, entitlement, power orientation, and superoptimism under proactive; cutoff, cognitive indolence, and discontinuity under reactive; sentimentality by itself)
Attributions	Beliefs about the causes of one's own or others' action; self-labeling and hostile attribution biases, whereby the individual perceives an unintentional act on the part of another person as a deliberate and hostile act, are two ways attributions help maintain a criminal lifestyle
Outcome expectancies	Beliefs about the anticipated consequences of crime and other behaviors; the criminal lifestyle is characterized by strong positive outcome expectancies for crime (money, power, acceptance) and weak negative outcome expectancies for crime (death, injury, incarceration)
Efficacy expectancies	Beliefs about one's chances of successfully engaging in a behavior or completing a task; the criminal lifestyle is associated with strong self-efficacy for crime and weak self-efficacy for conventional behavior
Goals	Objectives one pursues; the goals that direct a criminal lifestyle tend to be of short (reactive) to intermediate (proactive) range rather than long term
Values	Priorities that govern one's actions; a criminal lifestyle tends to be driven by physical (reactive) and mental (proactive) hedonistic values

of the transition phase, it is not uncommon to find the proactive (scheming, cold-blooded, e.g., "what's in it for me?") and reactive (impulsive, hot-blooded, e.g., "I'll get you for that!") dimensions of decision-making exerting independent, simultaneous, and poorly modulated effects on behavior.

Phase III: Maintenance

Whereas the majority of those who enter the initiation phase of a criminal lifestyle never progress to the transitional phase and a sizeable minority of persons who move into the transitional phase drop out before entering the maintenance phase, there is virtually no attrition from the maintenance phase. This is because the maintenance phase of a criminal lifestyle is a period of maximum lifestyle involvement, commitment, and identification.

Incentive: Fear of Change

As scary as a criminal lifestyle and its consequences (injury, death, and incarceration) may be, they are often not as frightening as the prospect of change. Fear of change consequently becomes the primary incentive for remaining in a criminal lifestyle long after it has stopped being fun. The individual feels compelled to remain in the lifestyle even though the benefits no longer seem to outweigh the costs, and it is a fear of change or better yet, a fear of the unknown, that is behind the individual's inactivity and apparent immobility. Things may not be as the person would like them to be but there is comfort to be found in the familiar, even when the familiar is no longer as comfortable as it once was. Giving up crime may be interpreted as symbolic death by someone in the maintenance phase or at least tacit acceptance that the years spent in a lifestyle were a waste of time and a poor decision on his or her part.

Opportunity: Psychological Inertia

Psychological inertia is based on Newton's first law of motion, which states that a body at rest will remain at rest and a body in motion will remain in motion unless acted upon by an outside force. Once a criminal lifestyle is in motion, it will maintain itself until acted upon by an outside force for change. The progenitors of psychological inertia are the six schematic subnetworks mentioned in the previous section on transition. Each of these quasi-time-stable cognitive factors gives rise to continuity in criminal behavior. Criminal thinking, for instance, provides offenders with a way of understanding the world

that is consistent from one situation to the next and helps rationale their ongoing criminal behavior. Attributions like self-labeling, outcome expectancies of unlimited power and control, high self-efficacy for crime and low self-efficacy for conventional behavior, short-term goals, and hedonistic values all keep the individual locked in chronic pattern of offending by way of psychological inertia.

Choice

During the maintenance phase of a criminal lifestyle, the individual may truly believe that he or she has no choice other than to remain in the lifestyle. Given that lifestyle commitment is maximal during this phase, it is easy to see why many late phase offenders feel "stuck" in the lifestyle or view continued criminal involvement as their "fate." Hence, attitudes expressed by probation officers, correctional staff, or even counselors suggesting that offenders never change (i.e., "once a criminal, always a criminal") may serve to inhibit the natural changes process that leads to change in even the most recidivistic of offenders. The ability to generate and evaluate alternatives is almost universally weak in those who reach the maintenance phase of a criminal lifestyle. Fear of change and psychological inertia only serve to reinforce the fatalistic belief that their situation will never change. There is hope, however, and this hope arrives in the form of the fourth and final phase of a criminal lifestyle, burnout and maturity.

Phase IV: Burnout and Maturity

The combined effect of the negative long-term consequences of a life of crime and the aging process leads to the fourth and final phase of a criminal lifestyle, burnout and maturity. Whereas burnout is a decrease in physical energy and stamina that makes crime more difficult and less pleasurable, maturity is a psychological process involving a genuine change in interests, goals, values, and activities. Physical burnout is inevitable, psychological maturity is not. An individual who is physically burned out but has not yet achieved psychological maturity may switch to a less physically taxing criminal activity, like dealing in stolen property; nevertheless, he or she will remain on the outskirts of the lifestyle. Whereas the transition from the maintenance phase of a criminal lifestyle to burnout and maturity can be abrupt, it is normally a gradual and uneven process.

Incentive: Fear of Death, Disability, and Incarceration

With respect to fear, the offender has come full circle once he or she enters the burnout/maturity phase of a criminal lifestyle. One of the factors associated with initiation of the lifestyle is a weakened bond between existential fear and physical survival and the creation of a robust bond between existential fear and some activity, in this case, the criminal lifestyle. During burnout/maturity the bond between existential fear and physical survival strengthens, while the existential fear-lifestyle bond weakens. This is achieved by way of a growing fear of incarceration, a fear of dying in prison, and fears associated with the negative consequences of a criminal lifestyle, namely, death, injury, and disability.

Opportunity: Approach and Avoidance

Several factors support desistence from crime by increasing opportunities for prosocial activity and decreasing opportunities for antisocial activity. This can be accomplished by approaching goals, options, and outcomes incompatible with crime, such as marriage, parenthood, and conventional employment, or avoiding goals, options, and outcomes compatible with crime, such as drug use, criminal associates, and settings where one has committed crime in the past. As approach and avoidance opportunity factors interact, burnout and maturity increase and the risk of future criminal involvement drops dramatically.

Choice

Choice plays a vital role in crime initiation, maintenance, and desistance. During burnout and maturity, its role is to focus the individual on the rapidly accumulating negative consequences of criminal behavior, from incarceration to death. Many individuals, as they get older, become better problem solvers. Age seems to have a positive

effect on a person's ability to both generate and evaluate alternatives and the negative consequences that accompany a criminal lifestyle are more difficult to accept and tolerate as the person ages. More people exit a criminal lifestyle during the initiation phase, but the greatest proportion of people exit the lifestyle during burnout and maturity. Fear of death, disability, and incarceration; approaching prosocial situations and avoiding antisocial ones; and placing greater emphasis on the negative consequences of crime than on the perceived benefits of crime are at the heart of the burnout and maturity phase.

Current Controversies

Nearly all of the research on lifestyle theory has been conducted on male inmates serving time in US federal prisons. A handful of studies have been conducted on US state prisoners and forensic patients and several studies have been done on European samples but only one study used female participants (Walters et al. 1998), and no studies have tested lifestyle theory in community corrections clients. The research base for lifestyle theory must consequently be expanded. Not only is there a need for more research on female offenders and community samples, but research on the invariance of lifestyle principles across ethnic groups and crime categories is also required. Research on juvenile samples is also needed. Whereas application of lifestyle theory to children and adolescents has been covered recently (i.e., Walters 2012a), there have been no research studies on lifestyle theory in which juveniles have served as subjects.

Assessment procedures have been developed to measure key concepts in lifestyle theory but the clinical utility of these measures remains largely untested. Thus far, the Lifestyle Criminality Screening Form (LCSF: Walters et al. 1991) has been developed to assess the behavioral dimensions of a criminal lifestyle (irresponsibility, self-indulgence, interpersonal intrusiveness, and social rule breaking), the Psychological Inventory of Criminal Thinking Styles (PICTS: Walters 1995) can be used to assess criminal thinking, and the Outcome Expectancies for Crime scales (OEC: Walters 2003) are available for assessing positive and negative outcome expectancies for crime. In the name of clinical utility, these measures should be capable of predicting important crime outcomes like recidivism with at least modest to moderate effectiveness. In addition, they should also possess incremental validity relative to easily obtained measures like age and criminal history.

Meta-analyses have been conducted on the LCSF ($k = 11$) and PICTS ($k = 7$) as predictors of recidivism, with r serving as the effect size measure and studies being combined using the random effects model. The results reveal a weighted effect size of .23 (95 % CI = .15–31) for the LCSF and .20 (95 % CI = .15–24) for the PICTS General Criminal Thinking (GCT) score. Viewing these results relative to Cohen's (1988) guidelines for small (.10), moderate (.24), and large (.37) effect sizes, we can see that the LCSF and PICTS both achieved effect sizes in the small to moderate range. Because the LCSF is a measure of criminal history, it is not possible to evaluate its ability to predict recidivism beyond the effects of age and criminal history. However, when the PICTS GCT score was entered into a regression equation behind age and criminal history, it continued to predict recidivism above and beyond the contributions of age and criminal history (Walters 2012b). A meta-analysis or incremental validity analysis could not be performed on the OEC because of a lack of recidivism data.

Theoretical articles and research reports on lifestyle theory have been published largely by one individual, the author of lifestyle theory. An allegiance effect can arise any time an author is evaluating his or her own theory and is most commonly observed in studies where an assessment device or therapeutic modality is being evaluated. Eight of the eleven LCSF studies and five of the seven PICTS studies included in the previously mentioned meta-analyses were performed by the author of lifestyle theory (Walters). A small difference was observed when the 13 effect sizes obtained in studies by Walters ($r = 0.23$, 95 % CI = 0.17–0.28) were

compared with the five effect sizes obtained in studies conducted by outside researchers ($r = 0.18$, 95 % CI = 0.09–0.26); however, the difference disappeared when a single outlying study was removed from the outside researcher group ($r = 0.22$, 95 % CI = 0.14–0.29). Only two empirical studies have evaluated the lifestyle approach to intervention and both were published by Walters (1999; 2005). Until outside researchers conduct more studies on lifestyle theory, the possibility of an allegiance effect for research on lifestyle theory remains an open question.

Open Questions

Besides investigating whether an allegiance effect accounts for some of the positive results obtained in research on lifestyle theory, there are three other open questions that demand attention. First, there is a need for more research on the hierarchical structure of criminal thinking. This hierarchy fits into the criminal thinking schematic subnetwork box found in Fig. 1, with general criminal thinking at the top, proactive and reactive criminal thinking in the middle, and the eight individual criminal thinking styles at the bottom. Applying item response theory (IRT) principles and confirmatory factor analysis to a sample of nearly 3,000 incarcerated male offenders, Walters, Hagman, and Cohn (2011) determined that the sentimentality scale did not load onto either of the two higher-order factors (proactive, reactive) or the superordinate general criminal thinking factor. Based on these results, it has been recommended that instead of calculating the GCT score by combining the raw scores of the eight thinking style scales, the seven thinking style scales other than sentimentality be used to calculate the GCT. Further research is nonetheless required to cross-validate these results in a noninstitutionalized sample.

A second open question is whether the cognitive factors in lifestyle theory mediate important crime relationships. In the first of several studies, Walters (2011) discovered that the PICTS GCT score partially mediated the relationship between a history of serious mental health problems and subsequent institutional violence in a group of federal prison inmates. A second study found that the GCT score partially mediated the relationship between race and recidivism (Walters in press b) and a third study revealed that the PICTS Reactive Criminal Thinking score partially mediated the relationship between prior substance abuse and subsequent recidivism (Walters 2012c). In a fourth study, Walters (in press a) determined that the GCT score and weak self-efficacy to avoid future police contact both mediated the relationship between past and future criminal conduct. It would appear that at least some of the quasi-time-stable cognitive factors in lifestyle theory are capable of mediating crime-relevant relationships, although further research is required to ascertain the extent to which the effect applies to all six factors.

A third open question is whether lifestyle intervention can be considered evidence based. Given that there have been only two empirical studies on lifestyle intervention to date (Walters 1999; 2005), there is insufficient evidence at this time to conclude that lifestyle intervention is evidence based. Nevertheless, the approach is manualized and has been adapted for use in an outpatient substance abuse program in Denmark (Thylstrup and Morten Hesse in press). One of the founding principles of lifestyle intervention is that while behavior proceeds cognition in the development of a lifestyle (i.e., a person starts acting like a criminal before he or she starts thinking like one), cognition proceeds behavior in lifestyle change (i.e., a person stops thinking like a criminal before he or she stops acting like one). Although cognition and behavior cannot be meaningfully separated, the early stages of lifestyle intervention focus primarily on challenging criminal thinking patterns and other cognitive mediators of criminal behavior, with the behavioral interventions becoming more prominent at latter stages of the treatment process. Research is required, however, to determine whether the progression proposed by lifestyle theory (i.e., start by focusing on cognition and then move into behavior) is justified.

Conclusion

The lifestyle theory of crime is presented for the purpose of illustrating how psychological factors are capable of furthering our understanding of criminal behavior. Lifestyle theory seeks to reconcile popular dichotomies in the field of criminology (classicism vs. positivism, propensity vs. development, continuity vs. change) by incorporating features of criminality that have been largely ignored by traditional criminological theories. After reviewing the developmental progression vital in initiating and maintaining a criminal lifestyle, controversial topics and open questions concerning the theory are discussed. The future of lifestyle theory depends on its ability to attract the attention of outside researchers and clinicians so that the model's potential can be tested and its limitations delineated.

Related Entries

- ▶ Career Criminals and Criminological Theory
- ▶ Cognitive/Information Processing Theories of Aggression and Crime
- ▶ Criminal Careers
- ▶ Desistance from Crime
- ▶ Interactional Theory of Delinquency
- ▶ Offender Change in Treatment
- ▶ Offender Decision Making and Behavioral Economics
- ▶ Psychopathy
- ▶ Psychopathy and Offending
- ▶ Social Control Theory of Sexual Homicide Offending

Recommended Reading and References

Bandura A (1986) Social foundations of thought and action: a social cognitive theory. Prentice-Hall, Englewood Cliffs

Cohen J (1988) Statistical power analysis for the behavioral sciences, 2nd edn. Lawrence Erlbaum, Hillsdale

Haslam N (2011) The latent structure of personality and psychopathology: a review of trends in taxometric research. Sci Rev Mental Health Prac 8:17–29

Newman JP, Schmitt WA (1998) Passive avoidance in psychopathic offenders: a replication and extension. J Abnorm Psychol 107:527–532

Sykes GM, Matza D (1957) Techniques of neutralization: a theory of delinquency. Am Sociol Rev 22:664–670

Thylstrup B, Hesse M (in press) The impulsive lifestyle counseling program for antisocial behavior in outpatient substance abuse treatment. Int J Offender Therapy Comp Criminol

Walters GD (1990) The criminal lifestyle: patterns of serious criminal conduct. Sage, Newbury Park

Walters GD (1995) The psychological inventory of criminal thinking styles: part I. Reliability and preliminary validity. Crim Justice Behav 22:307–325

Walters GD (1999) Short-term outcome of inmates participating in the lifestyle change program. Crim J Behav 26:322–337

Walters GD (2003) Changes in outcome expectancies and criminal thinking following a brief course of psychoeducation. Personal Individ Differ 35:691–701

Walters GD (2005) Recidivism in released lifestyle change program participants. Crim Justice Behav 32:50–68

Walters GD (2009) Latent structure of a two-dimensional model of antisocial personality disorder: construct validation and taxometric analysis. J Personal Disord 23:647–660

Walters GD (2011) Criminal thinking as a mediator of the mental illness-prison violence relationship: a path analytic study and causal mediation analysis. Psychol Serv 8:189–199

Walters GD (2012a) Crime in a psychological context: from career criminals to criminal careers. Sage, Thousand Oaks

Walters GD (2012b) Criminal thinking and recidivism: meta-analytic evidence on the predictive and incremental validity of the psychological inventory of criminal thinking styles (PICTS). Aggress Violent Behav 17:272–278

Walters GD (2012c) Substance abuse and criminal thinking: testing the countervailing, mediation, and specificity hypotheses. Law Human Behav 36:506–512

Walters GD (in press a) Cognitive mediation of crime continuity: a causal mediation analysis of the past crime-future crime relationship. Crime Delinq

Walters GD (in press b) Relationships between race, education, criminal thinking, and recidivism: moderator and mediator effects. Assessment

Walters GD, Elliott WN, Miscoll D (1998) Use of the psychological inventory of criminal thinking styles in a group of female offenders. Crim Justice Behav 25:125–134

Walters GD, Hagman BT, Cohn AM (2011) Toward a hierarchical model of criminal thinking: evidence from item response theory and confirmatory factor analysis. Psychol Assess 23:925–936

Walters GD, White TW, Denney D (1991) The lifestyle criminality screening form: preliminary data. Crim Justice Behav 18:406–418

Yochelson S, Samenow SE (1976) The criminal personality: vol. 1. A profile for change. Aronson, New York

Lifestyle Theory of Crime

► Lifestyle Theory

Linkage Analysis for Crime

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Synonyms

Behavioral linkage analysis; Comparative case analysis; Crime linkage analysis

Overview

Police investigators must often determine whether multiple crimes have been committed by the same offender. In ideal situations, this decision is based on an analysis of physical evidence left at crime scenes, such as DNA, fabric fibers, and/or fingerprints. However, despite what is portrayed in the popular media, such evidence is not always available to be processed (Davies 1991). Given this, the police have had to establish alternative methods for linking serial crimes. One of the most commonly used approaches is behavioral linkage analysis.

When using this form of analysis, an attempt is made to link crimes based on the behaviors that offenders engage in while committing their offenses. Specifically, the goal is to identify patterns of behavior across an offender's crimes that meet two criteria: behavioral stability and behavioral distinctiveness (Canter 1995). Behavioral stability exists when offenders behave in the same or similar way across their crime series (i.e., high levels of within-series similarity). Behavioral distinctiveness exists when the behaviors exhibited by one serial offender are different from those exhibited by other offenders committing similar types of crimes (i.e., low levels of between-series similarity). When offenders behave in a relatively stable and distinct fashion, it may be possible to link them to their crimes and to differentiate between crimes committed by different offenders (Bennell et al. 2009).

In the investigative setting, linkage analysis is most often carried out by crime analysts or police officers who have specialized training. Generally speaking, there are two ways that the linking task is approached (Woodhams et al. 2007). Proactive linking involves attempts to determine whether a new crime series can be identified by examining the similarities and differences that exist between unsolved crimes archived in a large database. In contrast, reactive linking typically involves attempts to determine whether unsolved crimes can be linked to a particular offense of interest to the police (it may also involve attempts to determine whether a specified set of crimes are the work of a common offender). In some cases, the perpetrator of an index crime may already be known to the police, and the task is to determine whether any unsolved crimes are the responsibility of that particular offender.

Although there is no one method for conducting behavioral linkage analysis, many approaches consist of the following steps: (1) searching for crimes that share similar behavioral features; (2) isolating all the similarities and differences between the crimes that are identified; (3) evaluating the importance of those similarities and differences by, for example, considering the base rates of the behaviors within larger samples of offenses (given that frequently occurring behaviors are unlikely to be useful for distinguishing between crimes committed by different offenders); (4) determining the likelihood of actual crime linkages; and (5) reporting the results of the analysis to investigators (Woodhams et al. 2007).

Historical Developments

The idea that an offender's behavior can be useful for linking crimes is not new. In Gross's (1906)

classic book, *Criminal Investigation*, he highlighted the potential value in using an offender's modus operandi, or MO, to link his crimes. Even before this, police agencies in England and Wales had begun developing sophisticated systems for categorizing MOs for the specific purpose of linking crimes (Fosdick 1915). For example, around the turn of the century, Chief Constable William Atcherley of the West Riding Yorkshire Constabulary developed a coding scheme for burglary MOs that increased the ease with which these crimes could be compared to one another. This system was further refined in North America to allow for more detailed comparisons (Vollmer 1919).

Such coding systems, which were used throughout the early 1900s, assumed that offenders exhibit behavior in a highly stable fashion across their crimes. However, thinking around this issue gradually changed. Investigators began to realize that an offender's MO can vary across his crimes for a number of reasons, including learning, maturation, and situational factors (Douglas and Munn 1992). This led to a search for crime features that would remain more stable over time. Law enforcement professionals began to distinguish between three related but distinct constructs: MO, ritual, and signatures (Hazelwood and Warren 2003). MO refers to functional behaviors that are required to successfully commit a crime. Ritual refers to fantasy-based behaviors, which are symbolic in nature and reflect the psychological needs of an offender. Finally, signatures refer to combinations of behaviors (MO or ritual) that are assumed to be relatively stable and unique to each offender. Despite the lack of empirical research to support their use, by the 1990s, linking crimes based on behavioral signatures became a popular approach (e.g., Keppel 1995).

In order to systematize the analysis of an offender's crimes, including their MO and ritual behaviors, police professionals have historically used charts that allow them to compare common and distinctive features exhibited across a set of crimes. While such charts are still commonly used today (Burrell and Bull 2011), sophisticated computer databases are also sometimes relied upon to track and analyze the behaviors of offenders (Collins et al. 1998). One of the first systems designed for this purpose was the Violent Crime Apprehension Program (ViCAP), which was developed by the Federal Bureau of Investigation for the purpose of enabling cross-jurisdiction crime linkages (Howlett et al. 1986). With the cooperation of police investigators from across the country who provide ViCAP with detailed information about the crimes they are investigating, this system allows the ViCAP team to organize, search, and analyze offense-related data in an attempt to identify patterns across crimes that may indicate the presence of serial offenders. Since the development of ViCAP, other systems have also been developed. Most notable among these is the Violent Crime Linkage Analysis System (ViCLAS). Constructed by the Royal Canadian Mounted Police in the mid-1990s (Collins et al. 1998), ViCLAS is currently being used by police forces around the world in an attempt to link serial crimes and is generally considered the gold standard for linkage systems.

Current Research

With the advent of standardized data collection protocols came the possibility of conducting empirical research to examine the degree to which behavioral information can be used to reliably link crimes to the same offender. While this field of research is still relatively new, the number of studies in this area has grown rapidly over the last decade. Existing studies examine a wide range of issues.

Tests of the Linking Assumptions

The majority of linking research conducted to date has attempted to determine whether the assumptions of behavioral stability and distinctiveness (and thus linking) are empirically supported. Many studies in this area use the same basic procedure: (1) the researcher categorizes crime scene behaviors into domains based on their particular function (e.g., wearing a mask is assigned to a "planning" domain in cases of

robbery); (2) behavioral similarity scores are calculated for each domain for pairs of crimes that have either been committed by the same offender (linked pairs) or different offenders (unlinked pairs); (3) a statistical procedure, such as logistic regression analysis, is then used to determine the degree to which these similarity scores discriminate between the two types of crime pairs; and (4) linking accuracy is quantified using a measure known as the area under the curve (*AUC*), derived from receiver operating characteristic analysis, which typically varies from 0.50 (chance accuracy) to 1.00 (perfect accuracy). In general, research of this type provides support for the assumptions underlying linkage analysis in crimes ranging from serial burglary (e.g., Bennell and Canter 2002) to serial homicide (e.g., Melnyk et al. 2011), with *AUC* values in the range of .60–.90 being frequently reported. Evidence is even emerging that it is possible to use certain types of behavioral information (e.g., spatial and temporal information) to accurately link offenses that fall into different crime categories (e.g., a residential burglary and a sexual assault committed by the same offender; Tonkin et al. 2011).

Using Behavioral Themes to Link Crimes

Rather than assigning behaviors to domains based on their particular function, other researchers have examined the linking assumptions by using clustering procedures (e.g., multidimensional scaling) to group crime scene behaviors into psychological themes (e.g., hostility). These themes then form the basis for further analysis. For example, Santtila et al. (2008) used Mokken scaling, which is similar to factor analysis, to derive behavioral themes (or dimensions) from the crime scene behaviors of Italian murderers. Using scores derived from seven dimensions as independent variables, and the series an offense belonged to as the dependent variable, they were able to use discriminant function analysis to correctly assign 62.9 % of crimes to the correct series. While lower accuracy rates have been reported for other types of crimes (e.g., serial arson; Santtila et al. 2004a), even these studies suggest that linkage accuracy exceeds levels that would be expected by chance.

Identifying Factors That Influence Linkage Accuracy

Many studies have also focused on identifying factors that might influence the accuracy with which crime linkages can be identified. While a range of factors have been explored (e.g., the type of similarity coefficient used to measure across-crime similarity; Melnyk et al. 2011), most research has examined whether certain crime scene behaviors (or themes) are more useful for linking purposes. Recent findings suggest that this is the case. For example, crime scene behaviors which are "offender-driven" appear to be exhibited in a more stable and distinct fashion by offenders (and are thus better predictors of whether crimes are linked) than behaviors that are more "situation-driven." In cases of serial burglary, for instance, the distance between crime site locations (which is obviously determined by where an offender decides to commit their crimes) can be a very effective linking cue, whereas the type of property stolen by an offender (which depends on what is available to be stolen) tends to lack high levels of predictive accuracy (Bennell and Canter 2002). Similar conclusions can be reached from studies of linkage analysis that have used the thematic approach. In Grubin et al. (2001) study of serial sexual assaults, for instance, behaviors related to a "control" theme (e.g., having a weapon, which would appear to be planned in advance of the crime) were exhibited more consistently than behaviors related to a "style" theme (e.g., taking money from the victim, which depends on situational factors).

Understanding the Complexities of Linking Decisions

Another body of research has investigated some of the complexities involved in linkage analysis by examining how decision-makers perform on laboratory-based linking tasks. For example, Santtila et al. (2004b) examined the performance of experienced car crime investigators, experienced general investigators, novice general investigators, and naive participants on a mock linking task using car crime data. They found that, while investigators were significantly more

accurate than naive participants, there were no differences between the different types of investigators in terms of their linking accuracy, with each group identifying about half of all possible links (although experienced car crime investigators did rely on significantly less information than every other group to make their decisions). The reasons why participants in these types of studies experience problems with identifying crime linkages are still not well understood, but they likely have to do with difficulties in selecting appropriate linking cues and in adequately processing this information (Bennell et al. 2010). It may also be the case that participants who have been examined in these types of studies lacked the necessary training or experience in linkage analysis to perform well on the tasks or that the tasks themselves were inappropriately designed.

The Development of Computerized Linking Algorithms

In contrast to the research just described, studies have also explored whether more "mechanical" approaches can be used to identify crime linkages, which is potentially important given the problems that people seem to encounter when faced with this task. In addition to various statistical approaches that have been examined (e.g., Bennell and Canter 2002), a variety of computer algorithms have also been tested (e.g., Yokota and Watanabe 2002). Studies indicate that these algorithms have the potential to automatically link crimes, sometimes with a high degree of accuracy, and that these procedures are associated with a number of advantages over other, more subjective, procedures. For example, some of the tested algorithms can weight behavioral similarity scores between crimes, such that information which is more prone to errors is given less weight (Brown and Hagen 2002). While it is still too early to make recommendations for how these computer algorithms (or similar tools) should be used in investigative settings, they may be able to effectively support the decisions currently being made by linkage analysts.

Examining Design Decisions from Previous Linking Studies

Finally, much of the research being conducted recently examines the impact of potentially problematic design decisions that have been made in previous studies. For example, most studies conducted on linkage analysis have relied on samples of solved serial crimes because, in order to determine linking accuracy, researchers need to know which crimes in their sample are actually linked. While this makes sense, designing studies in this way can bias results if the sampled crimes were originally linked and solved because they were characterized by highly similar or distinct MOs (Bennell and Canter 2002). If that were the case, levels of accuracy reported in these studies may overestimate what is actually possible when linkage analysis is applied to unsolved crimes. Fortunately, recent research that has examined linking accuracy for crimes first linked by MO versus DNA has indicated that similar levels of accuracy are observed, suggesting that there may be no need to worry about previous results (Woodhams and Labuschagne 2012). Similar attempts have been made to explore the impact of other design decisions, such as the common but questionable practice in most linking studies of excluding non-serial offenses from samples.

Remaining Challenges

Despite the growth in studies that has occurred over the last decade, challenges still remain, both for researchers working in this area and for practitioners who conduct linkage analysis.

Dealing with Problematic Data

Some of the most difficult challenges faced by both researchers and practitioners relate to issues around data quality (Burrell and Bull 2011; Woodhams et al. 2007). In both research and practice, linking decisions tend to be based on certain sources of data – typically victim statements or crime reports – that can be highly problematic. For example, with respect to victim

statements, victims can forget what occurred during a crime, they can be reluctant to talk about certain events, and reports of what they say can be distorted by the police (Alison et al. 2001). Crime reports, on the other hand, are often plagued with missing data, and certain pieces of information contained within them can be highly unreliable (e.g., the time that a burglary occurred). Any research results that emerge from such data sources, or any linkage decisions that are based on them, must obviously be viewed with caution, though improvements to data coding and recording protocols can improve the situation.

This type of data can also be very limited with respect to what it reveals about offenders and the crimes they commit, which can prevent, or at least hinder, useful lines of research or inquiry. For example, in other research contexts where high-quality data can be collected, it has been discovered that individual differences in noncriminal behavior are more stable across "psychologically similar" situations (e.g., Shoda et al. 1994). This is clearly an important finding that might have relevance to the linking context. Unfortunately, despite the efforts by some (e.g., Woodhams et al. 2008), it is difficult to examine these issues within the investigative context. It is typically not possible to observe crimes taking place, and data sources like victim statements do not tend to include detailed information about situational factors. This prevents researchers from examining potentially interesting (and useful) issues. For the linkage analyst, such problems limit their ability to understand how situations influence offenders and to interpret the meaning or significance of specific behaviors, which is often necessary to accurately link crimes.

Conducting (and Getting Access to) Valid Research

A related challenge for researchers in this area is to conduct studies which produce results that generalize to real investigations (i.e., externally valid studies). The challenge for practitioners is to make sound linking decisions in the absence of externally valid linking research. The primary issue for researchers is that attempts to improve the external validity of their studies can sometimes make the research more challenging to conduct. For example, in order to increase the validity of studies concerned with linking accuracy, researchers might want to include serial and non-serial crimes in their samples, rely on serial crimes that have been linked initially by DNA, and include every crime from each offender's series. The problem is that it is difficult, though not impossible (e.g., Woodhams and Labuschagne 2012), to get access to such data. Unfortunately, the further studies stray away from these sorts of samples, the more the generalizability of results will become a serious concern.

Given these issues, practitioners often face challenges in applying existing research to linking tasks. While the sorts of sampling issues described above are certainly part of the problem, there are additional (potentially more serious) issues that need to be addressed. Indeed, some practitioners argue that much of what is studied by researchers in this area is largely irrelevant for decisions that analysts routinely have to make, leading to calls for research that is more pragmatic in nature (Alison and Rainbow 2011). For example, most research to date has examined proactive linking, where large samples are searched, crime linkages are established, and accuracy is determined. However, analysts often encounter reactive tasks where they are asked to determine whether a set of offenses, thought to be connected by an investigator, are likely to be linked (Rainbow in press). At best, research on proactive linking tasks is relevant here and researchers have simply not made this clear. At worst, a large body of research that has been conducted is of little use in assisting analysts on common tasks that they encounter.

Withstanding Legal Scrutiny

Increasingly, linkage analysis is finding its way into court when questions are raised about whether a defendant is responsible for multiple crimes (Labuschagne 2006). This presents challenges for both researchers and practitioners. While practitioners will likely be the ones presenting at trial, for their testimony to be admitted in many jurisdictions good linking studies

will be required. Indeed, although standards of admissibility differ across jurisdictions, at least some rely on criteria that relate directly to research. For example, beyond having to establish expertise and demonstrate that testimony is relevant and useful (i.e., goes beyond the common understanding of the judge or juror), if one were to apply the *Daubert* criteria from the USA to any sort of linkage analysis, issues related to its reliability would also come up (Woodhams et al. 2007). Questions about the testability of the linking assumptions would likely be asked, in addition to other research-related questions pertinent to this issue (e.g., have the assumptions been tested, have the results of those tests been adequately published). It is doubtful that all the *Daubert* criteria would be met at the moment (Woodhams et al. 2007). Whether they are in the future will depend, to some extent, on the type of research that is conducted and published. In this way, researchers have a role to play in developing research that can allow linkage analysis to withstand legal scrutiny.

For practitioners, there are two issues they could potentially speak to at trial – behavioral similarities that exist across the crimes in question and/or how peculiar (distinct) the similar behaviors actually are (Ormerod 1999). As just discussed, the primary challenge for practitioners will be getting their evidence admitted. Usefulness might prove to be a controversial issue. Despite evidence to the contrary in some jurisdictions (e.g., Labuschagne 2006), it is debatable whether testimony related to similarities would be commonly heard by the courts given that jurors and judges can arguably perceive similarity for themselves (Ormerod 1999). However, evidence related to distinctiveness might be viewed as more useful. Issues of reliability could also be contentious. The practitioner will have to clearly demonstrate that distinctiveness exists and convince the court that their testimony is sound. Currently, there appears to be no standard (i.e., commonly accepted) protocol for measuring distinctiveness, and there is insufficient published research on this particular topic, especially as it relates to reactive linking tasks. While the increased use of crime linkage systems, such as ViCLAS, will assist in establishing base rates of behavior, the reliability of the data contained within these systems will have to be confirmed.

Related Entries

- ▶ Behavioral Investigative Advice
- ▶ Criminal Investigative Analysis
- ▶ Investigative Psychology

Recommended Reading and References

Alison LJ, Rainbow L (eds) (2011) Professionalizing offender profiling: forensic and investigative psychology in practice. Routledge, London

Alison LJ, Snook B, Stein KL (2001) Unobtrusive measures: using police information for forensic research. Qual Res 1:241–254

Bennell C, Bloomfield S, Snook B, Taylor PJ, Barnes C (2010) Linkage analysis in cases of serial burglary: comparing the performance of university students, police professionals, and a logistic regression model. Psychol Crime Law 18:507–524

Bennell C, Canter DV (2002) Linking commercial burglaries by modus operandi: tests using regression and ROC analysis. Sci Justice 42:153–164

Bennell C, Jones NJ, Melnyk T (2009) Addressing problems with traditional crime linking methods using receiver operating characteristic analysis. Leg Criminol Psychol 14:293–310

Brown DE, Hagen S (2002) Data association methods with application to law enforcement. Decis Support Syst 34:369–378

Burrell A, Bull R (2011) A preliminary examination of crime analysts' views and experiences of comparative case analysis. J Gov Inf 13:2–15

Canter DV (1995) Psychology of offender profiling. In: Bull R, Carson D (eds) Handbook of psychology in legal contexts. Wiley, Chichester, pp 345–355

Collins PI, Johnson GF, Choy A, Davidson K, MacKay RE (1998) Advances in violent crime analysis and law enforcement: Canadian violent crime linkage analysis system. J Gov Information 25:277–284

Davies A (1991) The use of DNA profiling and behavioral science in the investigation of sexual offences. Medic Sci Law 31:95–101

Douglas JE, Munn C (1992) Violent crime scene analysis: modus operandi, signature, and staging. FBI Law Enforce Bull 61:1–10

Fosdick RB (1915) The modus operandi system in the detection of criminals. J Am Inst Crim Law Criminol 6:560–570

Gross H (1906) Criminal investigation. G. Ramasawmy Chetty, Masdras

Grubin D, Kelly P, Brunsdon C (2001) Linking serious sexual assaults through behaviour. Home Office, London

Hazelwood RR, Warren JI (2003) Linkage analysis: modus operandi, ritual, and signature in serial sexual crime. Aggress Violent Behav 8:587–598
Howlett JB, Hanfland KA, Ressler RK (1986) The violent criminal apprehension program: a progress report. FBI Law Enforce Bull 55:14–22
Keppel RD (1995) Signature murders: a report of several related cases. J Forensic Sci 40:670–674
Labuschagne G (2006) The use of linkage analysis as evidence in the conviction of the Newcastle serial murderer, South Africa. J Investig Psychol Offender Profiling 3:183–191
Melnyk T, Bennell C, Gauthier D, Gauthier D (2011) Another look at across-crime similarity coefficients for use in behavioural linkage analysis: an attempt to replicate Woodhams, Grant, and Price (2007). Psychol Crime Law 17:359–380
Ormerod D (1999) Criminal profiling: trial by judge and jury, not criminal psychologist. In: Canter DV, Alison LJ (eds) Profiling in policy and practice. Ashgate, Aldershot, pp 207–261
Rainbow L (in press) A practitioner's perspective: theory, practice and research. In: Woodhams J, Bennell C (eds) Crime linkage: theory research and practice. CRC Press, Boca Raton
Santtila P, Fritzon K, Tamelander AL (2004a) Linking arson incidents on the basis of crime scene behavior. J Police Crim Psychol 19:1–16
Santtila P, Korpela S, Häkkänen H (2004b) Expertise and decision-making in the linking of car crime series. Psychol Crime Law 10:97–112
Santtila P, Pakkanen T, Zappalá A, Bosco D, Valkama M, Mokros A (2008) Behavioural crime linking in serial homicide. Psychology, Crime Law 14:245–265
Shoda Y, Mischel W, Wright JC (1994) Intra-individual stability in the organization and patterning of behavior: incorporating psychological situations into the idiographic analysis of personality. J Pers Soc Psychol 67:674–687
Tonkin M, Woodhams J, Bull R, Bond JW, Palmer EJ (2011) Linking different types of crime using geographical and temporal proximity. Crim Justice Behav 38:1069–1088
Vollmer A (1919) Revision of the Atcherley modus operandi system. J Am Inst Crim Law Criminol 10:229–274
Woodhams J, Bull R, Hollin CR (2007) Case linkage: identifying crimes committed by the same offender. In: Kocsis RN (ed) Criminal profiling: international theory, research, and practice. The Humana Press, Totowa, pp 117–133
Woodhams J, Hollin CR, Bull R (2008) Incorporating context in linking crimes: an exploratory study of situational similarity and if-then contingencies. J Invest Psychol Offender Profiling 5:1–23
Woodhams J, Labuschagne G (2012) A test of case linkage principles with solved and unsolved serial rapes. J Police Crim Psychol 27:85–98
Yokota K, Watanabe S (2002) Computer-based retrieval of suspects using similarity of *modus operandi*. Int J Police Sci Manag 4:5–15

Longitudinal

▶ Establishing Causes of Offending in Longitudinal and Experimental Studies

Longitudinal Crime Trends at Places

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Synonyms

Latent growth curves; Neighborhood crime trends; Time series; Trajectories

Overview

The role of space and place has a long tradition in American criminology largely germinating from the ground-breaking research of Shaw and McKay (1942). Yet by the 1960s and 1970s, criminological attention had turned almost wholly to individual-level causes of crime. Over the past three decades, however, researchers have rediscovered the central role of communities in the causation and control of crime. Like people, communities have a criminal history or "criminal career"; they experience relatively more or less criminal activity than both other places in the city and compared to their own levels at earlier periods in time. To the extent that the natural history of a community affects its current crime rates, its reputation for violence, and its projected levels and patterns of crime and violence in the future, the idea that a community may follow a specific type of trajectory, or "career" may be more theoretically useful to criminologists than are cross-sectional or static patterns across space. This entry describes the theoretical foundations of the literature on longitudinal crime trends at

places, provides an abbreviated overview of various methodological approaches to modeling community crime trajectories, elaborates on some key findings, considers the conceptual implications of the unit-of-analysis (or what is meant by "place"), and ends with a discussion of both thorny issues and future directions for research.

Introduction

If it is true that the whole is greater than the sum of its parts, then a key to the success of any social group is its ability to build and sustain a sense of community – to generate a capacity for realizing the shared interests, actions, and fortunes of its members (Sampson and Groves 1989). The criminological literature on space and place primarily is concerned with investigating how one's residential environment either creates vulnerabilities to risk of victimization or provides conditions conducive to offending among the already predisposed. Much scholarly work has identified the risk factors associated with crime in space, including: (1) the social and economic characteristics related to social disorganization such as poverty, family structure, residential mobility, ethnic and racial heterogeneity, and urbanization (Shaw and McKay 1942; Sampson and Groves 1989); (2) private, parochial, and public social controls (Bursik and Grasmick 1993; Carr 2003); (3) risky terrains rife with concentrated public housing, bus stops, liquor stores, leisure establishments, bars, and other entertainment venues (Caplan et al. 2011; Felson 1998; Griffiths and Tita 2009); and (4) gang territory or drug market locales (Tita and Ridgeway 2007), among others. These features affect the likelihood of criminal events occurring within neighborhoods.

Until recently, however, the neighborhood-effects literature treated local characteristics as if they were relatively static or fixed. That is, the presence, absence or level of various population and land use features were used to predict the distribution of crime across urban space. Despite having much success in explaining cross-sectional aggregate crime patterns, this approach fundamentally ignores one of the basic lessons of the early disorganization scholars: communities change over time, either as a consequence or independently of the outcome under study. For this reason, it is important to consider the joint spatial and temporal aspects of communities or, said differently, longitudinal crime trends at places.

In 1986, Reiss and Tonry edited a volume of *Crime and Justice: A Review of Research* entitled *Communities and Crime*. This volume emerged prior to what would become a plethora of studies on social disorganization and neighborhood effects over the succeeding decades. In anticipation of this scholarly interest, the authors of *Communities and Crime* prepared thoughtful and important essays on the dynamics of crime across urban space, focusing on issues of stability, change, and community careers in delinquency, crime, and violence (Reiss and Tonry 1986). Unfortunately, their call for attention to the dynamics of community crime trends went largely unheralded. While the neighborhood-effects literature mushroomed (Sampson et al. 2002), it remained predominantly targeted at difference in crime across space rather than changes in crime at places over time. Criminologists are certainly much better prepared to discuss the role of communities in crime causation as a consequence of the neighborhood-effects literature, but our understanding of how crime changes over time across place remains in its infancy.

The remainder of this entry is organized as follows. The first section describes the central theoretical arguments for explaining the dynamics of crime in space. In the second section, three common methodologies that have been employed to capture crime trends in empirical models are briefly outlined. The third section provides a short review of the literature on community trends in delinquency, crime, and violence. This is followed by a section that problematizes the plethora of "places" operationalized by researchers. Finally, the entry ends with a consideration of a number of data problems confronting scholars of neighborhoods and crime and touches upon anticipated directions of future research.

Theoretical Fundamentals

It was at the Chicago School that Clifford Shaw and Henry D. McKay first studied the distribution of delinquency across the city and pioneered one of the most important ideas in criminology of the twentieth century. In brief, Shaw and McKay (1942) observed that neighborhoods in the transitional zone – or in neighborhoods contiguous to but immediately outside of the central city – repeatedly represented the highest rates of juvenile delinquency over more than three decades (1900–1933), irrespective of the particular ethnic group residing in these places at any given period. In effect, then, rates of delinquency must be explained as a consequence of the conditions of the community rather than the personal characteristics of the persons who reside there. This finding, which undermines the premise that specific individuals or groups have an inherent predisposition toward antisocial behavior, was possible precisely because Shaw and McKay (1942) found stability in delinquency rates over a period in which extensive population change took place. It was the longitudinal nature of their research, in particular, that set the stage for this key theoretical breakthrough.

Despite its import, the heyday of social disorganization gave way as scholars turned toward individual-level explanations for offending behavior by the late 1950s and certainly the 1960s. A quarter of a century later, however, interest in places and crime trends reemerged. For example, Scheuerman and Kobrin (1986) explored the concept of stability and change in the crime rates of dangerous communities in Los Angeles and, in doing so, introduced the idea that communities have "careers" in crime in much the same way that individuals do. Specifically, they found that high-crime neighborhoods followed three distinct trends over two decades: emerging, transitional, and enduring. Moreover, the relationship between neighborhood deterioration and crime is a reciprocal one, with deterioration preceding initial spikes in crime but prompting additional deterioration once crime rates have reached high and stable levels. Scheuerman and Kobrin were focused on changes in social, economic, and family population characteristics of communities whereas both Wilson and Kelling (1982) and Skogan (1990) considered the potential reciprocity between crime and signs of neighborhood incivilities including social (panhandling, public intoxication, etc.) and physical (graffiti, broken windows, etc.) forms of disorder. According to this logic, places that appear to be uncared for by neighborhood residents and places that are void of private, parochial, and public controls are vulnerable to criminal invasion. The "spiral of decline" that ensues is inherently a temporal process (Skogan 1990).

While not focused specifically on the communities and crime question at its inception, it is noteworthy that Cohen and Felson's (1979) Routine Activity theory also centers on how large-scale social changes influence the dynamics of crime over time. The routine activities of everyday life, including the work and home activities that shape the tempo, timing, and guardianship capabilities of communities, help to explain aggregate crime trends. At its core, then, place-based crime trends are a reflection of broad social and economic transformations that can be tracked and modeled over time. Like social disorganization theory, the central premise of routine activities theory is rooted in an examination of crime rate trends in places, rather than static or cross-sectional levels.

Methodological Diversity

A series of methodological innovations make examining crime trends at places possible. Some of the first studies focused on stability and volatility in community crime relied on cross-lagged correlations or residual change scores to decompose the degree of change between t and t-1 that could not have been predicted on the basis of levels at time t-1 (Bursik 1986). For example, Bursik (1986) compares change score models to cross-sectional models predicting community delinquency rates in Chicago at each decade between 1930 and 1970. These comparisons lead him to conclude that, "without testing the assumption of stability, ecological models will

not only have a limited degree of theoretical power, but they will have an interpretive framework that is generally unrelated to the dynamics of modern urban areas" (Bursik 1986, p. 59). That is, static models ignore both expected and unexpected ecological changes that are entirely consistent with dominant theoretical explanations for community crime rates. A key limitation of these early methodological approaches is that they are "relatively cumbersome when multiple waves of data are analyzed and, for this reason, applications of such techniques have generally focused on a series of two-wave trends, providing a truncated sense of neighborhood change" (Kubrin and Herting 2003, p. 332).

More recent approaches to modeling neighborhood change and associated trends in crime rates utilize growth-curve modeling and/or semi-parametric group-based trajectory procedures. Growth-curve regression models take advantage of information about the individual slopes of each geographical unit-of-analysis under study to predict how various independent variables affect changes or trends in the dependent variable (Kubrin and Herting 2003; Braga et al. 2010, 2011). The advantage of such an approach is related to the fact that no trend information is lost in the estimation of the models. Alternatively, some scholars have exploited the capacity of Nagin's (1999) semi-parametric group-based trajectory procedure to reduce the temporal homicide rates of N census tracts, street segments, or other places into a smaller number of latent classes or groups exhibiting similar violence levels and following like-trends over some period of time (Griffiths and Chavez 2004; Groff et al. 2010; Weisburd et al. 2004). The resulting number and shapes of place-based homicide trajectories ostensibly capture the various types of place-based "criminal careers."

Key Findings

This section provides a brief (and, of necessity, incomplete) overview of a few of the key findings in the longitudinal crime trends at places literature. Much of the research focused on crime trends across place has modeled longitudinal homicide rates – sometimes disaggregating by victim-offender relationship, motive, or weapon type – in part due to data availability and quality issues (Griffiths and Chavez 2004; Jennings and Piquero 2008; Kubrin and Herting 2003; Stults 2010). For example, in using growth-curve models to capture-distinctive trends in general altercation, felony, and domestic homicide trends in St. Louis neighborhoods, Kubrin and Herting (2003) find that disaggregation of homicide type is imperative as neighborhoods vary in temporal trends by homicide type. In particular, various aspects of neighborhood structure are related to both the amount but also the nature of neighborhood homicide. Griffiths and Chavez (2004) likewise demonstrate that Chicago neighborhoods exhibiting a high and increasing gun homicide trend between 1980 and 1995 have marked unobserved heterogeneity in their criminal careers (i.e., in their total homicide trajectories). Some of these neighborhoods are characterized by a high and unstable homicide trajectory driving citywide trends over the period, as one might expect. Yet four times as many neighborhoods following a high and increasing gun homicide trend are characterized by a moderate and relatively stable total homicide career over the same period, relative to other neighborhoods in the city. Cumulatively, these studies provide substantial evidence that place-based patterns in homicide type reveal considerable variability and instability both over time and across space.

Research at the county-level also illustrates the importance of place in understanding temporal homicide patterns. Jennings and Piquero (2008) show, for example, that rural counties are significantly more likely to exhibit non-declining intimate-partner homicide trends between 1980 and 1999, compared to their urban counterparts. And McCall et al. (2011) have recently extended this literature to examine temporal changes in the homicide rates of US cities over 30 years. Not only are cities distinguished by multiple and varied homicide trajectories, but disadvantage and other characteristics associated with social disorganization more generally (McCall et al. 2011; see also Land et al. 1990) predict membership in the

consistently more violent city groupings compared to those cities that are members of the lower and more stable latent classes.

The literature on longitudinal crime trends at places is not limited to homicide research. For example, Weisburd et al. (2004) find that a very small group of street segments in Seattle are responsible for generating volatility in the city-wide pattern of total criminal incident reports to police, as the vast majority of street segments follow relatively stable trends between 1989 and 2002. Studies employing trajectory or growth-curve models for crime trends at places have also measured juvenile arrests (Weisburd et al. 2009), robbery rates (Braga et al. 2011), and disorder (Yang 2010), among others. The bulk of the literature on trends in all types of criminal events at most aggregate micro (e.g., street segment, face block, intersection, etc.) and macro (e.g., census tracts, cities, counties, etc.) units-of-analysis has repeatedly shown that very few places are responsible for high rates of crime and violence, that these places tend toward volatility rather than stability in trends over time, and that the nature of the events under study (e.g., gun violence, intimate versus non-partner victim-offender relationship, age of offender, etc.) affect levels, trends, and the distribution of incidents both across places and over time.

A Plethora of "Places"

The neighborhood-effects literature is rightfully concerned with what geographers call the Modifiable Areal Unit Problem – or the extent to which the unit-of-analysis used by the researcher as an operationalization of neighborhoods influences the findings of the study (Openshaw and Taylor 1979). Scholars interested in understanding neighborhood levels and changes in violence have tended to use census tracts as an approximation of neighborhoods (Griffiths and Chavez 2004; Hipp 2007; see Fagan 2008) while those focused on the emergence and stability of hot spots in micro-places have elected to use even smaller aggregates, such as street segments or block faces (Braga et al. 2010; Weisburd et al. 2004, 2010). Any unit-of-analysis is associated with both advantages and disadvantages, some of which are related to data availability (particularly over time), the spatial units at which policing agencies release information on criminal incidents within their jurisdictions, census units required to access structural characteristics of place, and size of the residential population or daily population flows into and out of the physical space.

One consideration in selecting the geographical unit of analysis is the extent to which the findings at one level are either robust across levels of analyses or almost wholly dependent upon the researchers' definition of place (Hipp 2007). The problem is this: while findings that can be replicated at multiple aggregate units are arguably more robust than findings which vary across aggregations, robustness across units that bear little relation to one another or to what we mean by "neighborhood" suggests that the concept of neighborhood is relatively unimportant. It is not the extent to which the same findings can be replicated at different operationalizations that should matter, so much as the fit between the operationalization of neighborhoods in empirical research and neighborhoods on-the-ground, as identified and understood by residents.

The longitudinal crime trends at places literature is among the most open to the use of extremely varied aggregate units. This is, in part, because not all research in this area is concerned with neighborhood crime trends. Specifically, Braga and Weisburd (2010, p. 2) note that "micro-places" are "specific locations within the larger environments of communities and neighborhoods. . .[] sometimes defined as buildings or addresses, sometimes as block faces or street segments, and sometimes as clusters of addresses, block faces, or street segments." It is in these micro-units that crime "hot spots" emerge. St. Jean (2007) makes the same point in his ethnographic study of a high-crime neighborhood in Chicago. He finds that very few streets within this community are the sites of crime and violence. The same result is found by Groff and colleagues (2010) in their quantitative study of street segments in Seattle, Washington.

In this case, Groff et al. (2010) establish that there is considerable variability in the 16-year crime trajectories of street segments that are adjacent to one another; consequently, they argue that this heterogeneity in the criminal careers of very small geographic units which are situated in close spatial proximity reflects "the importance of looking at the micro level" (Groff et al. 2010, p. 26).

The openness of scholars in the longitudinal crime trends at places literature to using various different spatial aggregation of the unit-of-analysis generates a great deal of information about how crime is situated both in space and over time. Both the hot spots and the neighborhood crime literatures have benefitted from consideration of the size and shape of "places.' At the same time, the opportunity to cherry-pick the size of the unit under study may necessitate careful theoretical unpacking. For example, how many street segments comprise a neighborhood? How is living beside a street segment following a high-crime trajectory different from living far away from one or any? Are any of the census classifications (e.g., tracts, blocks, etc.) reasonable proxies for neighborhoods? Does the concept of neighborhood really matter? What do we mean by "place" and how do places of varying sizes, shapes, and histories change the empirical picture?

Methodological Considerations and Future Directions

The longitudinal-crime-trends-at-places literature is an exciting field of study that remains largely in its infancy. As a consequence, scholars who study crime trends at places face difficulties related not only to the theoretical issues associated with defining places but also to methodological complications. A continual challenge is the availability of appropriate spatial and longitudinal data. For example, to predict changes in crime trends at places, scholars require data capturing changes in the various independent variables that are associated with aggregate levels of crime. The most widely accessible and most commonly used data on the social and economic conditions of place are compiled by the United States Census, which are available only on a decennial basis for most areas of the country. Land use and other characteristics of place not drawn from the Census can be coded to more fully specify quantitative models predicting crime trends. The problem these scholars face, however, is in explaining *changes* in crime as a consequence of risk factors in the setting (e.g., bars, leisure establishments, public housing) that remain relatively static over 5, 7, or even 10 years. In essence, researchers need to distinguish the "vulnerability" to crime created by these relatively stable criminogenic environmental conditions from "exposure" to crime, captured in unstable local crime trends (Caplan and Kennedy 2011).

In order for researchers to better model and specify how vulnerabilities in the form of local criminogenic conditions can result in different rates of exposure (or changes in crime over time), the gap between theory and data must be addressed. In particular, future researchers need to develop and collect more dynamic indicators of place-based crime and associated behaviors, social and demographic characteristics, land use, and other temporal aspects of place. Researchers need to consider innovative sources of data and more refined measures of key characteristics of places.

Greater attention should also be focused on measuring the intervening mechanisms which link risk and place, and which underlie the process of change in crime at places. Recent research on crime and place has identified a number of potential avenues to consider, such as social capital, collective efficacy, formal and informal social control, culture, and social isolation, among others. A renewed focus on intervening mechanisms requires that researchers integrate spatial and temporal data on these dynamics as a function of place. While developing innovative ways of substantively measuring intervening mechanisms is important, future research must also better specify the proper time lags for capturing change over time, as well as the reciprocal effects of patterns of crime, place-based characteristics, and intervening mechanisms.

Finally, future research needs to consider how the unique spatial characteristics of place create important considerations for change over time. While much of the focus on the dynamics of longitudinal trends in crime at places has centered on temporal change, we must not forget about space. A focus on space means that researchers must aim for a substantive understanding of the environment which surrounds a place, both socially and physically. Researchers need to consider how external factors may influence trajectories of crime and other place-based characteristics. The characteristics of proximate places may directly and indirectly influence levels and changes in crime. Future research should assess the interrelationship between internal rates and changes in both crime and place-based characteristics as well as external (environmental) factors. External influences include, but are not limited to, the structural and demographic characteristics of proximate places, as well as larger economic and political factors. Places may be influenced by their immediate neighbors, local law enforcement, political and economic policies, and decisions which occur well beyond the boundaries of a particular place. Focused attention toward these theoretical and methodological issues will further develop our collective understanding of the meaning of space, place, and time in the criminological literature.

Related Entries

- ▶ Crime and the Racial Composition of Communities
- ▶ Crime Mapping
- ▶ Disadvantage, Disorganization and Crime
- ▶ Group-Based Trajectory Models
- ▶ History of Geographic Criminology Part I: Nineteenth Century
- ▶ Hot Spots and Place-Based Policing
- ▶ Neighborhood Effects and Social Networks
- ▶ Police Legitimacy and Police Encounters
- ▶ Social Network Analysis and the Measurement of Neighborhoods
- ▶ Spatial Perspectives on Illegal Drug Markets

Recommended Reading and References

Braga AA, Weisburd DL (2010) Editor's introduction: empirical evidence on the relevance of place in criminology. J Quant Criminol 26(1):1–6

Braga AA, Papachristos AV, Hureau DM (2010) The concentration and stability of gun violence at micro places in Boston, 1980–2008. J Quant Criminol 26(1):33–53

Braga AA, Hureau DM, Papachristos AV (2011) The relevance of micro places to citywide robbery trends: a longitudinal analysis of robbery incidents at street corners and block faces in Boston. J Res Crime Delinq 48(1):7–32

Bursik RJ Jr (1986) Ecological stability and the dynamics of delinquency. In: Reiss AJ, Tonry M (eds) Communities and crime. Crime and justice: a review of research, vol 8. University of Chicago Press, Chicago

Bursik RJ Jr, Grasmick HG (1993) Neighborhoods and crime: the dimensions of effective community control. Lexington Books, New York

Caplan JM, Kennedy LW (eds) (2011) Risk terrain modeling compendium. Rutgers Center on Public Security, Newark

Caplan JM, Kennedy LW, Miller J (2011) Risk terrain modeling: brokering criminological theory and GIS methods for crime forecasting. Justice Q 28(2):360–381

Carr PJ (2003) The new parochialism: the implications of the Beltway case for arguments concerning informal social control. Am J Sociol 108(6):1249–1291

Cohen LE, Felson M (1979) Social change and crime rate trends: a routine activity approach. Am Sociol Rev 44(4):588–608

Fagan J (2008) Crime and neighborhood change. In: National Research Council Committee on Understanding Crime Trends, Committee on Law and Justice, Division of Behavioral and Social Sciences and Education (ed) Understanding crime trends: workshop report. The National Academies Press, Washington, DC

Felson M (1998) Crime and everyday life, 2nd edn. Pine Forge Press, Thousand Oaks

Griffiths E, Chavez JM (2004) Communities, street guns and homicide trajectories in Chicago, 1980–1995: merging methods for examining homicide trends across space and time. Criminology 42(4):941–978

Griffiths E, Tita G (2009) Homicide in and around public housing: is public housing a hotbed, a magnet, or a generator of violence for the surrounding community? Soc Probl 56(3):474–493

Groff ER, Weisburd D, Yang S-M (2010) Is it important to examine crime trends at a local "micro" level?: a longitudinal analysis of street to street variability in crime trajectories. J Quant Criminol 26(1):7–32

Hipp JR (2007) Block, tract, and levels of aggregation: neighborhood structure and crime and disorder as a case in point. Am Sociol Rev 72(5):659–680

Jennings WG, Piquero AR (2008) Trajectories of non-intimate and intimate partner homicides, 1980–1999:

the importance of rurality. J Crim Justice 36(5): 435–443
Kubrin CE, Herting JR (2003) Neighborhood correlates of homicide trends: an analysis using growth-curve modeling. Sociol Q 44(3):329–350
Land KC, McCall PL, Cohen LE (1990) Structural covariates of homicide rates: are there any invariances across time and social space? Am J Sociol 95(4):922–963
McCall PL, Land KC, Parker KF (2011) Heterogeneity in the rise and decline of city-level homicide rates, 1976–2005: a latent trajectory analysis. Soc Sci Res 40(1):363–378
Nagin DS (1999) Analyzing developmental trajectories: a semi-parametric, group-based approach. Psychol Methods 4(2):139–157
Openshaw S, Taylor PJ (1979) a million or so correlation coefficients: three experiments on the modifiable areal unit problem. In: Wrigley N (ed) Statistical applications in the spatial sciences. Pion, London
Reiss AJ Jr, Tonry M (1986) Communities and crime. Crime and justice: a review of research, vol 8. The University of Chicago Press, Chicago
Sampson RJ, Groves WB (1989) Community structure and crime: testing social disorganization theory. Am J Sociol 94(4):774–802
Sampson RJ, Morenoff JD, Gannon-Rowley T (2002) Assessing 'neighborhood effects': social processes and new directions in research. Annu Rev Sociol 28:443–478
Scheuerman L, Kobrin S (1986) Community careers in crime. In: Reiss AJ, Tonry M (eds) Communities and crime. Crime and justice: a review of research, vol 8. University of Chicago Press, Chicago
Shaw CR, McKay HD (1942) Juvenile delinquency and urban areas. University of Chicago Press, Chicago
Skogan WG (1990) Disorder and decline: crime and the spiral of decay in American neighborhoods. University of California Press, Berkeley
St. Jean PKB (2007) Pockets of crime: broken windows, collective efficacy and the criminal point of view. The University of Chicago Press, Chicago
Stults BJ (2010) Determinants of Chicago neighborhood homicide trajectories: 1965–1995. Homicide Stud 14(3):244–267
Tita G, Ridgeway G (2007) The impact of gang formation on local patterns of crime. J Res Crime Delinq 44(2):208–237
Weisburd D, Bushway S, Lum C, Yang S-M (2004) Trajectories of crime at places: a longitudinal study of street segments in the city of Seattle. Criminology 42(2):283–321
Weisburd D, Morris NA, Groff ER (2009) Hot spots of juvenile crime: a longitudinal study of arrest incidents at street segments in Seattle, Washington. J Quant Criminol 25(4):443–467
Weisburd D, Groff ER, Yang S-M (2010) Understanding developmental crime trajectories at places: social disorganization and opportunity perspectives at micro units of geography. Final report to the National Institute of Justice, 2005-IJ-CX-0006, March 2010
Wilson JQ, Kelling G (1982) Broken windows. *The Atlantic Monthly*, March, 29–38
Yang S-M (2010) Assessing the spatial-temporal relationship between disorder and violence. J Quant Criminol 26(1):139–163

Longitudinal Studies in Criminology

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Overview

The purpose of this entry is to "take stock" of the important contributions of longitudinal studies in the field of criminology. First, classic longitudinal studies in criminology are reviewed. Second, the authors review key findings from the major contemporary longitudinal studies that focus on the development of crime and delinquency. Third, there are numerous longitudinal studies that have a broader focus but have important provided important insight into crime and delinquency; thus, some of the contributions of these studies are examined. To conclude, potential avenues for future research are suggested.

Introduction

Core issues that capture the imagination of criminologists, such as identifying the antecedents of criminal behavior or why some individuals desist from crime while others continue criminal lifestyles, are issues which require longitudinal data to disentangle. Sheldon and Eleanor Glueck conducted a series of seminal studies (1950) that demonstrated that long-term follow-ups studies were both feasible and valuable to the study of crime and delinquency. Since then, there have been specific calls for more longitudinal studies

(e.g., Farrington et al. 1986) and recently, there has been considerable growth in both number and quality of longitudinal studies of crime and delinquency. These studies are integral in shaping how the study of crime has been advanced.

Longitudinal, or panel, data consists of repeated observations on the same units of analysis over time, offering many advantages over cross-sectional data. Some of these advantages include having a better precision of the sequence of events timing and measurement; studying intra-individual change; and disentangling direct and indirect causal chains of analyses (Thornberry and Krohn 2003). Despite the vast potential, many early researchers who had access to longitudinal data did not take advantage of this potential and analyzed their data as though it were cross sectional (Farrington et al. 1986). The growth in the number of studies that use longitudinal data in recent years can be attributed to a number of factors including methodological and analytical advances especially developed for panel data. Further, many of the contemporary studies in criminology were initiated in the 1980s with cohorts born in the 1970s. Thus, these data are just now coming to into fruition. Undoubtedly, the use of longitudinal data has advanced the field of criminology both in terms of theory and policy (this, however, is not without controversy).

The purpose of this entry is to "take stock" of the important contributions of longitudinal studies in the field of criminology. Given the abundance of studies, however, this is not a straightforward task. Past reviews of longitudinal research have broadly consisted of two approaches. Some reviews of the literature have discussed key findings of each study (e.g., Thornberry and Krohn 2003), while other reviews choose key topics and summarize the findings across studies (e.g., Farrington 2003). The authors approach the topic by using both approaches. First, the classic longitudinal studies in criminology are reviewed. These studies are important in that they provided a springboard both methodologically and theoretically in which contemporary researchers could be inspired. Second, the key findings from the major contemporary longitudinal studies (that focus on the development of crime and delinquency) are examined. Some of these studies are still ongoing and scholars are just beginning to witness the returns to these data. Third, there are numerous longitudinal studies that have a broader focus, such as the *National Longitudinal Survey of Youth*, but include crime and delinquency measures. The contributions of these studies are reviewed. Finally, this entry concludes by suggesting potential avenues for future research.

Classic Longitudinal Studies

Classic longitudinal studies are characterized by the following of one cohort over time. Information was often collected through official records on a number of important factors such as family life, school, employment, police contacts, and court dispositions. Records would be collected over a number of times. By following one cohort however, potential problems such age, period, and cohort effects can arise (see Farrington et al. 1986). Another criticism is that early researchers did not pay attention to the exact timing of specific events so that causal mechanisms can be established (see Farrington 1988). Although single cohort designs are criticized, it is important to spend some time looking at some of the seminal works in the study of the development of crime and delinquency.

Sheldon and Eleanor Glueck are considered the pioneers of longitudinal research in crime and delinquency. The Gluecks' study consisted of 500 delinquent boys (recruited at ages 7–11) living in the Boston area. Each delinquent was matched with a nondelinquent by age, family background, general intelligence, ethnicity, and residence in an under-privileged neighborhood (Glueck and Glueck 1950). The Gluecks' inquiry fell into five main categories: family and personal background, body types, health, intelligence, and temperament and character. The major contribution of the Gluecks' was their discovery that factors relating to temperament and family characteristics played an important role in later delinquency, and emphasized early detection and prevention.

Another reason why the Gluecks' study is one of the most important longitudinal inquiries is because of the highly influential work of Robert Sampson and John Laub (1993). Sampson and Laub reanalyzed the Glueck data using modern analytic techniques and formulated their age-graded theory of informal social control, which posits that informal social bonds can be an important factor in continuity in and desistance from crime. In 2003, Laub and Sampson conducted a follow-up study of the original participants of the study. In addition to following up with official records of all the original participants, they conducted in-depth interviews with 50 of the men who were in their 70s at the time of follow-up. This makes their study the longest follow-up study in criminology. A number of important contributions have stemmed from Sampson and Laub's work including insight into the mechanisms of desistance and turning points, which include importance of marriage, work, and military service.

The Cambridge Study in Delinquency Development is a prospective study composed of a sample of 411 boys from South London who were aged 8 or 9 between 1961 and 1962. The goal of the original Cambridge study was to test several hypotheses about delinquency: first was to describe development of delinquent and criminal behavior; to assess the efficacy of prediction; and to explain why or why not it continued to adulthood. The investigators examined socioeconomic conditions, schooling, friendship, parent–child relationships, extracurricular activities, school records, and criminal records. They also performed psychological tests to determine the causes of crime and delinquency. The importance of this study is that there have since been follow-up studies of the men up to the age of 48. Few studies have followed as many subjects for as long as the Cambridge study. Researchers are still analyzing data from the Cambridge Study to assess important criminological puzzles.

Another seminal longitudinal study is the Philadelphia Birth Cohort, collected by Wolfgang et al. (1972), which has been described as "one of the turning points in criminological research in the United States" (Laub 2004). The study is composed of two birth cohorts, 1945 and 1958. The 1945 cohort consisted of males who resided in Philadelphia from 10 years (most from birth) to at least 18 years old, and contains almost 10,000 cases. Information contained in school records, police records, and dispositions from juvenile and criminal court records was used to provide important descriptive information and also to allow the researchers to predict offending behavior. Since 1968, Wolfgang et al. were able to follow up and conduct interviews with 567 of the original sample from 1945. The follow-up consisted of questions pertaining to offenses in which the participants were not arrested for. The 1958 cohort study was a replication of the 1945 study to assess whether there were any cohort effects. The 1958 cohort was much larger, over 28,000 subjects and resulted in substantively comparable findings.

The most important contribution of Wolfgang et al.'s study is their identification of the "chronic offender," which they identified as boys with four or more offenses. They found that the chronic offenders consisted of 18 % of the delinquents but were responsible for over half of all the offenses. Further, the Wolfgang et al. (1972) study found that the probability of committing an offense increased with each successive offense committed. That is, the probability of committing a second offense after the first was about 50 %, the third after the second was about 79 %, and about 80 % thereafter. In fact, Wolfgang et al. (1972) have been credited as being the seed of the criminal career paradigm (Piquero et al. 2007). The notion of the chronic offender and methods to prospectively identify such individuals still captures the interest of scholars today.

Other classic studies have also provided a foundation for the study of criminal careers. For example, Blumstein et al. (1985) were able to prospectively identify chronic offenders based on low IQ, poor parent–child rearing, convicted parents, conduct, and other behavioral problems among a London cohort. Other scholars have also argued that factors such as parent–child rearing and early signs of aggression can be predictive of later delinquency. Robins (1978) showed that there is continuity in antisocial behavior and

offending. These studies support the famous "Robin's Paradox," which argues that "antisocial behavior virtually requires childhood antisocial behavior; yet most antisocial children do not become antisocial adults" (p. 611). Horney and Marshall (1991) focused on the reliability of life event calendars and emphasized the importance of short-term within-individual variability. Other issues such as work and crime have been made possible through longitudinal studies such as the National Supported Demonstration Work Project. Lyle Shannon also added to criminal career work by following three cohorts from Racine, Wisconsin.

The authors have spent time on some detail reviewing several classic longitudinal studies in the hopes of illustrating the innovative and creative nature of early longitudinal research. These studies provide a foundation in which contemporary researchers are able to refine research designs and move toward a better understanding of the development of crime and delinquency. Indeed, scholars today are still using classic longitudinal studies to provide commentary on new questions (e.g., the next section turns to contemporary longitudinal studies. In reviewing these studies, the authors take a slightly different approach and use the key findings from the past 20 years of longitudinal research as a guide.

Contemporary Longitudinal Studies

The contemporary longitudinal studies reviewed in this entry are more eclectic than the classic studies. They are, however, often larger-scale studies with various methodological improvements over classic studies. For example, rather than one cohort, many of them employ "accelerated cohort" designs, which tracks several cohorts over a shorter period of time while others follow subjects who are closely clustered in age. Many are also conducted at multiple sites. Krohn and Thornberry (2008) identify three main purposes of contemporary longitudinal studies. The primary purpose is to describe delinquent and criminal careers. The second purpose is to identify causal mechanisms of delinquent behavior. The third purpose is to identify the consequences of delinquent/criminal behavior. To be sure, different longitudinal studies have different emphases. For example, some may focus on structural characteristics while others focus on biological factors. There are dozens of studies that can be considered contemporary longitudinal studies, with many still ongoing. These studies have been conducted across various samples and throughout numerous countries. The burgeoning of information makes the task of reviewing contemporary longitudinal studies challenging. Thus, as an organizing framework, the authors identified five key findings gleaned from longitudinal studies in criminology over the past several decades. The five findings include: problem behavior begins early; parents, school, peers, and social structure remain consistent risk factors; there is often co-occurrence of problem behaviors and delinquency; there is a substantial amount of continuity in crime and delinquency; and there is also a considerable amount of change. Each will be reviewed in succession.

1. *Problem behavior begins early*

Since Wolfgang et al.'s finding of the chronic offender, there has been great interest in identifying individuals who are at high risk of becoming chronic or life-course persistent individuals. Several longitudinal studies focus on identifying early signs of risk factors. Risk factors can be identified prenatally or when children are very young (before the age of 6). Scholars have found that prenatal complications, such as exposure to substances like cigarettes, alcohol, and other drugs, interact with psychosocial and environmental factors, such as maternal rejection, poor parenting, neighborhood disadvantage, and low-income, to produce a heightened risk of later antisocial behavior.

Early childhood signs include disruptive behavior like aggression and negative emotionality (Tremblay et al. 2003). Researchers have found that there is a moderately stable relationship between early disruptive behavior and other similar behaviors (heterotypic). Important findings such as those from the Pitt-Mother and Child Project show that very few children have an onset

of conduct behavior before the age of 5 or 6. Further studies suggest that the earlier a child is identified and treated, the higher is the likelihood of prevention. Several longitudinal studies have been central to our understanding of early childhood risk factors on later delinquency. This group of studies would include the Montreal Longitudinal and Experimental Study (Tremblay et al. 2003), which tracks subjects from kindergarten to high school and has a special focus on parent–child relationships. The Dunedin Study is a multidisciplinary study that follows 1,000 individuals for almost 40 years and the Longitudinal Study of Biosocial Factors Related to Crime and Delinquency which studies the prenatal and child-related health of a high-risk sample of boys.

2. *Important factors: parents, schools, peers, and social structure*

The previous section discussed how early childhood risk factors can set a child on to a path to later delinquency. Similarly, there are factors in later childhood and adolescence that are also indicative of persistent delinquent behavior. In 1986, the Office of Juvenile Justice and Delinquency Prevention funded a large-scale project entitled the Program of Research on the Causes and Correlates of Delinquency. These projects consisted of: the Denver Youth Study, the Pittsburgh Youth Study, and the Rochester Youth Development study. In a review of the findings of these and four other large-scale longitudinal studies, Thornberry and Krohn (2003) identified parenting, schools, peers, and social structure as consistent factors that can affect children's lives. These predictors can be taken as part of a risk factor approach or guided by criminological theory. Nevertheless, examining these factors provides a useful approach to reviewing longitudinal studies.

Various indicators of poor parenting have been consistently found to be positively related to delinquent or problem behavior. Using the Rochester Youth Development Study, childhood and adolescent maltreatment is linked with later antisocial behavior. Sampson and Laub (1993) found that parent–child attachment mediated the relationship between poverty and delinquency. Similarly, findings from the Montreal Longitudinal Study suggest that healthy child-rearing practices and supervision are crucial protective factors against future antisocial behavior (Tremblay et al. 2003). Using data from the Cambridge Study, scholars investigated childhood neglect and juvenile delinquency and found that the odds of juvenile conviction were over four times higher for subjects who were exposed to childhood neglect than subjects who were not.

Children spend vast amounts of time in school, and thus, experiences in school are an important factor to consider in the development of delinquency. Low levels of intellectual ability and academic achievement are a consistent predictor of delinquency and other problem behaviors (Thornberry and Krohn 2003). For example, Raine et al. (2002) found that life-course persistent offenders had lower visuomotor functioning than other subjects. A birth cohort from Kuai was followed and results suggest that individuals who had below average intellectual skills had a greater likelihood of antisocial behavior.

The relationships between delinquent peers and one's own delinquency have been a part of many longitudinal studies. There is strong support for the causal role that deviant peers play. For example, research suggests that deviant peers provide support and opportunity for delinquent behavior which in turn has an effect on the patterns of associations an individual has. Moreover, in mid-adolescence, selection and socialization are important whereas in late adolescence, socialization is more important. New longitudinal methods have been developed to assess the impact of delinquent peers. Longitudinal social network data gathered by the Netherlands Institute for the Study of Crime and Law Enforcement's School Study, a study that focuses on social networks and the role of peers in delinquency. Scholars have used Simulation Investigation for Empirical Network Analyses, a method that can estimate the effects on individual changes in network ties as well as effects on changes in individual behavior, and found that the average delinquency of an individual's friends has a significant causal effect on the individual's behavior.

The idea of delinquent peers has extended to inquiry into the causes and consequences of gang

membership. Krohn and Thornberry (2008) commented that longitudinal studies are an "ideal design for investigating the impact of gang membership on life-course development" (p. 130). For example, the Seattle Social Development Project is an example of a longitudinal study that looks at the development of both positive and problem behaviors among adolescents and young adults. Researchers using data from the study found that youth who are gang members more often commit property and violent offenses.

Since Shaw's work on juvenile delinquency prevention in the 1930s in Chicago and the founding of the Chicago Area Project, structural factors have been an important part in investigating the development of delinquent behavior. Shaw and McKay's (1942) seminal work on social disorganization pointed to community factors such as poverty, population mobility, and population heterogeneity as correlates of delinquency. Several contemporary studies have also incorporated structural factors in their design. For example, the Project on Human Development in Chicago Neighborhoods (PHDCN) is an interdisciplinary study which assesses families, schools, and neighborhoods affect child and adolescent development. The PHDCN has two components: a neighborhood level component and an individual level component. Researchers using the PHDCN have provided important insight into the dynamics of the mediating effects of social control on neighborhood disadvantage (Sampson and Morenoff 2006). The Denver Youth Study also integrated high-risk neighborhoods as an integral part of the study.

3. *Co-occurrence of problem behaviors and delinquency*

There have been calls by prominent criminologists for the discipline to consider a broader set of behaviors beyond crime (Sampson and Laub 1993), with the rationale that there may be an underlying dispositional trait between crime and other risky behaviors. Important questions such as whether all problem behaviors, such as substance abuse, delinquency, school problems, aggression, promiscuity, and violence, represent one underlying syndrome and to what extent risk factors are the same for all problem behaviors are of central concern for developmental researchers. Results to date suggest that this is the case. Huizinga et al. (2000) found that individuals with serious delinquency also are more likely to have mental health problems. Similarly, data from the Denver Youth Study show that there is overlap between violent behavior and mental health problems. Using data from the Cambridge study, Piquero and colleagues (2011) found that chronic offenders were more often hospitalized and have a registered disability. Loeber et al. (1998) looked at eight problem behaviors, including substance use, conduct problems, physical aggression, and depression, and found that they were interrelated. Thus, how extensive the overlap between offending behavior and other problem behavior is unclear but commentary on this topic has been consistently positive.

4. *There is a significant amount of continuity*

According to Farrington (2005), one of the most widely accepted conclusions about the development of offending is that there is a marked continuity in antisocial behavior. That is, there is a relative stable ordering of individuals on some level of antisocial tendency. This important finding has motivated scholars to investigate what the mechanisms behind continuity are. Two divergent explanations have dominated criminology: state dependence and population heterogeneity. State dependence argues that the effects of earlier offending have an effect on later offending whereas population heterogeneity offers persistent individual differences as an explanation to continuity. Blokland and Nieuwbeerta (2010) use data from the Criminal Career and Life-course Study, which follows 4,684 Dutch offenders for the better part of their lives, and found that both population heterogeneity and state dependence partially explain continuity in offending. The more an individual offends, however, the effect of state dependence weakens. Violent and aggressive behavior also appears to have continuity. Farrington (1993) suggests that there is continuity in bullying behavior – both within and between generations. Individuals who self-report bullying at 14 were more likely to report bullying at age 32. Their children were also more likely to be bullies.

5. *There is also change*

Thus far, the authors have not portrayed an optimistic view of the development of offending. While there is a marked continuity in offending and other problem behaviors, there is also a great deal of change. Investigation into change was sparked by Sampson and Laub's (1993) study. The scholars found that there are multiple pathways to desistance and identified four major factors associated with change: marriage, the military, reform school, and neighborhood change (Laub and Sampson 2003). The study of desistance remains a challenge however, because measuring desistance is not straightforward. For example, there is debate regarding the definition of what constitutes cessation from crime and the data are ultimately right censored. Moreover, the methodological advancement developed has allowed scholars to study population heterogeneity in developmental offending trajectories by identifying groups of distinct trajectories. Piquero (2008) reports over 60 studies that have employed such group-based trajectory modeling to study change over time.

The idea of change provides researchers with incentive to explore the factors and mechanisms that contribute to desistance. For example, Hawkins et al. (1992) advocate for a risk factor preventive approach whereby risk factors are identified and then addressed to promote desistance. The idea of change was the impetus behind The Pathways to Desistance project. The Pathways study is a large collaborative, multidisciplinary project that followed 1,354 serious juvenile offenders aged 14–18 for 7 years after their adjudication. The main purpose of the study is to identify factors related to continued desistance. General findings suggest that almost all offenders greatly reduce their offending and longer stays in institutions do not reduce recidivism.

Other Important Longitudinal Studies

It is important to note that the authors have based our review primarily on panel studies that focus on the development of crime and delinquency. There are, however, many longitudinal studies that have a broader focus but also include delinquency measures. These studies are often large in scale and are of a representative population sample of adolescents. These studies are rich sources of data that provides insight into many important criminological questions that only longitudinal studies can shed light on.

A couple of the national longitudinal surveys commonly used in criminological research include: the National Longitudinal Survey of Youth (NLSY) and the National Youth Survey (NYS). The National Longitudinal Survey of Youth is a study of 9,000 individuals who were born in 1980–1984 and has been used to study issues such as education, work, and crime (Lochner 2004). The National Youth Survey began in 1976 and is ongoing. Parents and youth were interviewed about both conventional and deviant types of behavior by youths. Important studies on drug use deterrence, labeling, and peer influence have used the NYS.

Monitoring the Future is an annual nationally representative survey of American high school students. Annual follow-up questionnaires are mailed to individuals in each graduating class for a few years after their initial participation. Data from Monitoring the Future has provided insight into patterns of drug use and work and delinquency. The National Longitudinal Study of Adolescent-Health (Add-Health) is also a nationally representative sample of adolescents in grades 7–12. In addition to collecting information on neighborhood, family, social, psychological, health, and economic well-being, the Add-Health collects information on the social networks of adolescents. This has generated a number of important studies that provide commentary on the nature of delinquent peers.

Future Directions

The discipline of criminology owes much of its knowledge of the development of offending to past and current longitudinal studies. In this entry, the authors reviewed classic studies that are the foundation of longitudinal studies in criminology, key findings gleaned from contemporary panel

studies, and some of the important nationally representative longitudinal studies on adolescent well-being. However, it is realized that there are other important longitudinal studies that were not included in this entry. To this end, the authors urge readers to explore previous syntheses of longitudinal studies (Blumstein et al. 1986; Delisi and Piquero 2011; Farrington 1988b; Liberman 2008; Thornberry and Krohn 2003).

Despite considerable advances made in the study of the development in crime and delinquent behavior over the last few decades, there are avenues that would benefit from greater scholarly investment. One such avenue is longitudinal experimental designs. Despite highlighting the value of longitudinal experimental studies over 20 years ago, Farrington (2006) was able to only identify four longitudinal experiments that have incorporated significant pre- and post-developmental measures, suggesting that there is a dearth of research that assesses the long-term effects of interventions.

As ongoing longitudinal studies extend into their subjects' early adulthood, it is important to investigate intergenerational study of crime and delinquency. Elder (1985) noted that one of central tenets of studying the life course is the notion of linked lives, which refers to the interaction between individuals and their social world. He argues "Each generation is bound to fateful decisions and events in the other's life course" (p. 40). Issues of central concern such as continuity and change can be extended to look at intergenerational patterns in crime and problem behaviors. Ongoing studies such as the Rochester Developmental Youth Survey and the Denver Youth Study are gathering information on the children of the participants. Preliminary results from these studies and past studies like the Ohio Life Course Study suggest that there is a clear relationship between the antisocial behaviors of parents and their children.

Finally, an important yet often neglected line of inquiry is investigation into the processes of co-offending. Co-offending has important implications for the development of criminal careers. For example, co-offenders tend to be more prolific offenders, are more likely to engage in violence, and have longer criminal careers (McGloin and Nguyen 2012). Indeed, greater insight into co-offending can be important in terms of theory and policy. In conclusion, longitudinal studies in criminology have made significant strides since the Glueck's Unraveling Delinquency study. Continued improvements in methodological designs, advancements in statistical applications, and theoretical refinements will provide scholars of crime with a number of interesting avenues for research.

Recommended Reading and References

Blokland AAJ, Nieuwbeerta P (2010) Considering criminal continuity: testing for heterogeneity and state dependence in the association of past to future offending. Aust N Z J Criminol 43(3):526–556

Blumstein A, Farrington DP, Moitra S (1985) Delinquency careers: innocents, desisters and persisters. In: Tonry M, Morris N (eds) Crime and justice: an annual review of research, vol 6. University of Chicago Press, Chicago, pp 187–219

Blumstein A, Cohen J, Roth JA, Visher CA (eds) (1986) Criminal careers and "career criminals". National Academy Press, Washington, DC

Delisi M, Piquero AR (2011) New frontiers in criminal careers research, 2000–2011: a state-of-the-art review. J Crim Justice 39:289–301

Elder GH (ed)(1985) Life course dynamics: trajectories and transitions, 1968–1980. Project of SSRC Committee on the Life Course. Cornell University Press, Ithaca

Farrington DP (1988a) Advancing knowledge about delinquency and crime: the need for a coordinated programme of longitudinal research. Behav Sci Law 6:307–331

Farrington DP (1988b) Studying changes within individuals: the causes of offending. Studies of psychosocial risk: the power of longitudinal data. In: Rutter M (ed) Studies of psychosocial risk: the power of longitudinal data. Cambridge University Press, Cambridge, pp 158–183

Farrington DP (1993) Understanding and preventing bullying. In: Tonny M, Morris N (eds) Crime and justice, vol 17. University of Chicago Press, Chicago

Farrington DP (2003) Key results from the first 40 years of the Cambridge study in delinquent development. In: Thornberry TP, Krohn MD (eds) Taking stock of delinquency: an overview of findings from contemporary longitudinal studies. Kluwer, New York, pp 137–174

Farrington DP (2006) Key longitudinal-experimental studies in criminology. J Exp Criminol 2:121–141

Farrington DP, Ohlin LE, Wilson JQ (1986) Understanding and controlling crime: toward a new research strategy. Springer, New York

Glueck S, Glueck E (1950) Unraveling juvenile delinquency. Commonwealth Fund, New York
Hawkins J, Catalano R, Miller J (1992) Risk and protective factors for alcohol and other drug problems in adolescence and early adulthood: implications for substance abuse prevention. Psychol Bull 112:64–105
Huizinga D, Loeber R, Thornberry TP, Cothern L (2000) Co-occurrence of delinquency and other problem behaviors. Bulletin. U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Washington, DC
Krohn MD, Thornberry TP (2008) Longitudinal perspectives on adolescent street gangs. In: Lieberman A (ed) The long view of crime: a synthesis of longitudinal research. Springer, New York, pp 128–160
Laub JH (2004) The life course of criminology in the United States: the American Society of Criminology 2003 presidential address. Criminology 42(1):1–26
Laub JH, Sampson RJ (2003) Shared beginnings, divergent lives: delinquent boys to age 70. Harvard University Press, Cambridge
Liberman AM (2008) The long view of crime: a synthesis of longitudinal research. Springer, New York
Lochner L (2004) Education, work, and crime: a human capital approach. Int Econ Rev 45(3):811–843
Loeber R, Farrington DP, Stouthamer-Loeber M, Van Kammen WB (1998) Antisocial behavior and mental health problems: explanatory factors in childhood and adolescence. Lawrence Erlbaum, Mahwah
McGloin JM, Nguyen H (2012) "It was my idea": considering the instigation of co-offending. Criminology 50(2):463–494
Piquero A (2008) Taking stock of developmental trajectories of criminal activity over the life-course. In: Lieberman A (ed) The long view of crime: a synthesis of longitudinal research. Springer, New York, pp 23–78
Piquero AR, Sheperd I, Sheperd JP, Farrington DP (2011) Impact of offending trajectories on health: disability, hospitalisation and death in middle-aged men in the Cambridge study in delinquent development. Crim Behav Mental Health 21(3):189–201
Raine A, Yarlian PS, Reynolds C, Venables PH, Mednick SA (2002) Spatial but not verbal cognitive deficits at age 3 years in persistently antisocial individuals. Develop Psychopathol 14(1):25–44
Robins LN, Radcliffe KS (1980) The long-term outcomes of truancy. In: Hersov L, Berg I (eds) Out of school. Wiley, New York
Sampson RJ, Laub JH (1993) Crime in the making: pathways and turning points through life. Harvard University Press, Cambridge
Sampson RJ, Morenoff JD (2006) Durable inequality: spatial dynamics, social processes and the persistence of poverty in Chicago neighborhoods. In: Bowles S, Durlauf S, Hoff K (eds) Poverty traps. Princeton University Press, Princeton, pp 176–203
Shaw CR, McKay HD (1942) Juvenile delinquency in urban areas. University of Chicago Press, Chicago
Thornberry TP, Krohn MD (2003) The development of panel studies of delinquency. In: Thornberry TP, Krohn MD (eds) Taking stock of delinquency: an overview of findings from contemporary longitudinal studies. Kluwer, New York, pp 1–6
Tremblay RE, Vitaro F, Nagin D, Pagani L, Seguin JR (2003) The Montreal longitudinal and experimental study rediscovering the power of descriptions. In: Thornberry TP, Krohn MD (eds) Taking stock of delinquency: an overview of findings from contemporary longitudinal studies. Kluwer, New York, pp 205–254
Wolfgang ME, Figlio RM, Sellin T (1972) Delinquency in a birth cohort. University of Chicago Press, Chicago

Low Self-Control

► General Theory of Crime

Low-Level Data Forensics

► Computer Forensics